Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

No. 73-1908.

STEWART S. CORT, ET AL.,

Petitioners,

v.

RICHARD A. ASH.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR CERTIORARI FILED JUNE 20, 1974.

CERTIORARI GRANTED NOVEMBER 11, 1974.

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DOCKET ENTRIES.

1 Sept. 28, 1972. Complaint filed.

Sept. 28, 1972. Summons Exit.

Sept. 28, 1972. JURY TRIAL DEMANDED.

2 Sept. 28, 1972. Order appointing Jeffrey A. Cokin to make service upon the defts' in this action, filed. 9/29/72 entered and copies mailed.

3 Sept. 29, 1972. Service accepted by G. L. Frankenfield on behalf of Bethlehem Steel Corp., filed.

4 Oct. 5, 1972. Notice of deft Bethlehem Steel Corp. of taking deposition of Plff Richard Ash, filed.

5 Oct. 6, 1972. Appearance of Blank, Rome, Klaus & Comisky, Esqs. for defts' Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, C. Thompson Stott, and Ivor D. Sims, filed.

6 Oct. 6, 1972. Appearance of Blank, Rome, Klaus & Comisky, Esqs. For Bethlehem Steel Corp., filed.

7 Oct. 11, 1972. Summons returned with affidavit of Jeffrey Cokin thereof, filed.

8 Oct. 13, 1972. Plff's Motion for Temporary Restraining Order, Memorandum in Support and Order that Motion is DENIED, filed. 10/16/72 entered and copies mailed.

9 Oct. 18, 1972. Appearance of Blank, Rome, Klaus & Comisky, Esqs. for defts' Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs and George P. Jenkins, filed.

10 Oct. 18, 1972. ANSWER, of all defts, filed.
CASE LISTED FOR TRIAL.

11 Oct. 24, 1972. Defts' Proposed Findings of Fact and Conclusions of Law, filed.

12 Oct. 26, 1972. Letter dated 10/16/72 to Judge Troutman from Cletus Lyman, Esq. Re: Counsel to prepare Amended Motion and Order as well as a supplemental breif, filed (As of 10/20/72).

13 Oct. 26, 1972. Plff's Motion for Preliminary Injunction, Memorandum of Law in Support and Notice thereof filed as of 10/20/72, filed.

14 Oct. 26, 1972. Plff's Amended Motion for Preliminary Injunction and Memorandum in Support thereof filed as of 10/20/72, filed.

15 Oct. 26, 1972. Defts' Memorandum in Opposition to Plff's Motion for Preliminary Injunction, filed.

16 Oct. 26, 1972. Stipulation of Agreed Upon Facts of Plff and defts', filed as of 10/20/72, filed.

17 Oct. 26, 1972. Letter dated 10/23/72 to Judge Troutman from Cletus Lyman, Esq. Re: Change of phrases in proposed draft of preliminary injunction, filed.

18 Oct. 27, 1972. Findings of Fact, Conclusions of Law Troutman, J. and Order that plff's motion for Preliminary Injunction is DENIED, filed. 10/30/72 entered and Notices mailed.

19 Nov. 1, 1972. Plff's Notice of Appeal, filed.

20 Nov. 1, 1972. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

Nov. 2, 1972. Record Transmitted to U. S. Court of Appeals (U. S. C. A. #72-1984).

21 Jan. 3, 1973. Transcript of 10/20/72, filed.

22 Jan. 15, 1973. Defts' Motion for Security for Expenses and Notice thereof, filed.

23 Jan. 15, 1973. Defts' Memorandum in support of Motion for Security for Expenses, filed.

24 Feb. 7, 1973. Plff's interrogatories to Nominal deft, Bethlehem Steel Corp., filed.

25 Feb. 7, 1973. Plff's Request to Nominal Deft, Bethlehem Steel Corp. for Production of Documents, No. 1, filed.

26 Feb. 9, 1973. Plff's Preliminary Memorandum in Opposition to defts' Motion for Expenses, filed.

27 Feb. 9, 1973. Certified copy of Judgment in lieu of formal mandate received from U. S. C. A. that the judgment of the District Court entered 10/27/72 is Affirmed, filed. 2/9/73 entered and copy to J. Troutman.

Feb. 9, 1973. Record on Appeal Returned.

28 Feb. 9, 1973. Withdrawal of Affidavit of Cletus P. Lyman and Submission of Affidavit of Richard A. Ash, filed.

29 Feb. 13, 1973. Defts' Objections to Plff's interrogatories, filed.

30 Feb. 13, 1973. Defts' Objections to Plff's Request for Production of Documents, No. 1, filed.

31 Mar. 7, 1973. Order that defts' motion for security for expenses as it relates to Count 1 of plff's complaint is Denied; that plff post a Bond in the Amount of $35,000 as security for expenses and such bond to be posted within (10) days of the date of this Order; plff's preliminary memorandum as a Motion for leave to Amend the complaint is GRANTED and that defts' objections to plff's interrogatories and request for documents as they relate to this Motion are sustained, filed. 3/7/73 entered and copies mailed.

32 Mar. 13, 1973. Plff's Motion to Compel Answers to Interrogatories, Memorandum in Support and Notice thereof, filed.

33 Mar. 19, 1973. Plff's notice of taking deposition of deft, Stewart S. Cort, filed.

34 Mar. 19, 1973. First Amended Complaint, filed.

35 Mar. 29, 1973. Defts' Motion for Summary Judgment, Certificate of Service and Notice thereof, filed.

36 Mar. 29, 1973. Memorandum of Law in Support of defts' Motion for Summary Judgment, filed.

37 Mar. 30, 1973. Defts' Motion for a Protective Order, Certificate of Service and Notice thereof, filed.

38 Mar. 30, 1973. Defts' Memorandum of Law in support of Motion for Protective Order, filed.

39 Apr. 10, 1973. Plff's praecipe for entry of default on first amended complaint and affidavit in support thereof, filed.

Apr. 10, 1973. Defts' defaulted for failure to plea, filed.

40 May 4, 1973. Defts' Motion to set aside Entry of Default and for Sanctions and Notice thereof, filed. (ANSWER TO AMENDED COMPLAINT ATTACHED).

41 May 4, 1973. Defts' Memorandum in support of Motion to set aside Entry of Default and for Sanctions, filed.

Jun. 4, 1973. ARGUED SUR: Deft's Motion to set aside default.

42 Jun. 5, 1973. Order that defts' motion to set aside entry of default is GRANTED, defts' motion for sanctions is DENIED and that Plff respond to defts' motion for summary Judgment within (10) days from the date of this Order, filed. 6/6/73 entered and copies mailed.

43 Jun. 15, 1973. Plff's Memorandum in opposition to defts' Motion for summary judgment and Exhibits in support thereof, filed.

44 Jun. 21, 1973. Defts' Reply Memorandum in support of Motion for Summary Judgment, filed.

45 Jun. 22, 1973. Transcript of 6/4/73, filed.

46 July 3, 1973. Defts' Memorandum of Law in opposition to plff's Motion for an Evidentiary Hearing and for continuation of defts' Motion for Summary Judgment, filed.

47 July 9, 1973. Plff's Motion for an Evidentiary Hearing on the Question of Plff's standing and for Continuation of defts' Motion for Summary Judgment, Memorandum of Law in Support and Notice thereof, filed.

48 July 9, 1973. Affidavit of Richard A. Ash, Esq. in Support of Motion for an evidentiary hearing etc., filed.

49 July 11, 1973. Order that Plff's motion for an evidentiary hearing and for continuation of defts' motion for summary judgment is DENIED and that defts' motion for summary judgment is GRANTED, filed. 7/12/73 entered and copies mailed.

50 July 18, 1973. Plff's Notice of Appeal, filed.

51 July 18, 1973. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

Aug. 7, 1973. RECORD TRANSMITTED TO U. S. C. A. (U. S. C. A. #73-1739).

Oct. 4, 1973. Bond for Costs on Appeal in the sum of $250.00 with Fidelity and Deposit Co. of Maryland, filed.

52 Oct. 31, 1973. Certified copy of Order received from U. S. C. A. DENYING Appellees' motion to Dismiss appeal on the ground that Appellant has failed to file a bond for costs on appeal, filed. 11/1/73 entered and copy mailed to Judge Troutman.

53 Jun. 13, 1974. Defts' Memorandum of Law in Opposition to Plff's Motion for leave to take depositions and to Request Production of Documents, filed.

54 Jun. 14, 1974. Plff's Motion for leave to take depositions and to request production of Documents, Memorandum in Support and Notice thereof, filed.

55 Jun. 27, 1974. Order that plff's motion for leave to take depositions and to request production of documents pending appeal is DENIED, filed. 6/28/74 entered and copies mailed.

56 July 11, 1974. NOTICE OF APPEAL OF PLFF, FILED.

57 July 11, 1974. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

July 16, 1974. FIRST SUPPLEMENTAL RECORD TRANSMITTED TO U. S. COURT OF APPEALS.

Sep. 6, 1974. plff's. bond for costs on appeal, in the amount of $250.00, and with Fidelity and Deposit Co. of Maryland as surety, filed.

58 Nov. 14, 1974. Certified copy of ORDER, from the U. S. C. A., that def.-appellee's motion to dismiss the appeal for lack of jurisdiction is referred to the panel before which this appeal is listed for disposition; Appellee is granted 10 days within which to file its answering brief, filed.

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104
ON BEHALF OF HIMSELF,
AND ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

Plaintiff,

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS

THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS,

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION

Defendants

AND

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,

Nominal Defendant.

COMPLAINT.

1. Plaintiff Richard Ash is an individual residing at the Plaza Apartment, 18th & Benjamin Franklin Parkway, Philadelphia, Pennsylvania.

2. Nominal defendant, Bethlehem Steel Corporation (Bethlehem Steel) is a Delaware Corporation with principal office located at 701 East Third Street, Bethlehem, Pennsylvania, engaged, *inter alia,* in the business of steel production, distribution and sale.

3. Bethlehem Steel is the second largest United States steel producer with annual gross sales in excess of $3.5 billion annually. It maintains plants and offices for the carrying out of its business throughout the United States, including the Eastern District of Pennsylvania.

4. Defendants Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, Ivor D. Sims, C. Thompson Stott, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs and George P. Jenkins, are individuals residing within the United States, who com-

prise the Board of Directors of Bethlehem Steel, Cort being the Chairman of said Board. Foy, Bickford, Broeker, Reed, Sims and Stott serve additionally as top echelon executives of said company; Foy as its President; and the others as Executive Vice Presidents.

5. By virtue of their said positions with Bethlehem Steel, defendants control the policy making of the corporation, its implementation of such policies, and the disbursement of corporate funds pursuant to and in furtherance of such policies.

6. Bethlehem Steel is a publicly held corporation whose stock is traded and listed on the New York Stock Exchange. Its stock is widely distributed to in excess of 200,000 holders, a substantial number of whom live within the United States and within the Eastern District of Pennsylvania.

7. Plaintiff is, and was at all times herein material, the owner of 50 shares of Bethlehem Steel stock. He is, in addition, a citizen of the United States, registered and qualified to vote in the 1972 United States presidential election.

8. Plaintiff brings this action in an individual capacity as a shareholder, a United States citizen and a qualified voter in the said presidential election, and derivatively on behalf of Bethlehem Steel Corporation, and alleges that he is well able to fairly, ably and effectively represent the rights and interests of said corporation.

9. No demand has been made upon the Directors of Bethlehem Steel to seek similar redress directly, because said Directors are involved in and responsible for the wrongdoing out of which plaintiff's suit arises.

10. No request for concerted action has been made to plaintiff's fellow shareholders in Bethlehem Steel, because

they are too numerous and too widely scattered to make such request practicable.

11. This action is not a collusive one to confer jurisdiction upon a court of the United States which it would not otherwise have.

COUNT I.

12. This count arises out of alleged violation by defendants of the criminal statutes of the United States governing elections and political activities, commonly known as the Federal Corrupt Practices Act, specifically Title 18, Section 610, U. S. C. A. of said Act, and the private remedy for redress of grievances implied under said Act. Jurisdiction is invoked under Title 28, Section 1331, U. S. C. A., the amount in controversy exceeding the sum of $10,000, exclusive of interest and costs.

13. At some time in 1971 or 1972, defendants entered into a plan involving the utilization of Bethlehem Steel's resources, including the expenditure of its funds, in connection with the 1972 United States presidential election.

14. The ultimate purpose of said plan was to influence the United States electorate to help bring about a Republican Party victory in said election. This purpose was solely in furtherance of the individual interests and beliefs of defendants and was in violation of state and federal law, and in derogation of the rights of the United States public, and of the approximate one half of the shareholders of Bethlehem Steel that are registered members of the Democratic political party.

15. Thereafter, in furtherance of said plan and purpose, defendants caused, and continue to cause, corporate resources to be utilized, including the expenditure of substantial funds in connection with said political campaign,

including, *inter alia,* their causing to be prepared and disseminated at corporate expense, an advertisement entitled "I SAY LET'S KEEP THE CAMPAIGN HONEST. MOBILIZE 'TRUTH SQUADS' . . .", attributed to defendant Cort. (A copy of said advertisement is attached hereto and made part hereof as Exhibit "A".)

16. Said advertisement has been and is being communicated to the United States' electorate as aforesaid, *inter alia,* by insertion in various magazines of national circulation, including NEWSWEEK, TIME, U. S. NEWS & WORLD REPORT, BUSINESS WEEK, SATURDAY REVIEW, INDUSTRY WEEK, FORBES, HARVARD BUSINESS REVIEW, EDITOR & PUBLISHER, and in various local newspapers, and by a direct mailing, to Bethlehem Steel shareholders.

17. The aforesaid actions by defendants have been and are in violation of said Federal Election law, which states in its here material part that:

> "It is unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for. . . ." Title 18, Sec. 610, U. S. C. A.

18. The said actions by defendants are, *a fortiori,* unlawful in that they involve the utilization of corporate resources for partisan political purposes in connection with said presidential election, pursuant to defendants' plan and purposes.

19. The said advertisement is blatantly partisan on its face, in that it in essence calls for the mobilization of "truth squads" to keep the campaign honest, on the basis of the following factors extracted therefrom:

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

* * *

"As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: 'The time has come for a tax system that says to big business—you must pay your fair share.'" (Exhibit "A")

All of which factors can only reasonably be imputed to activities of Democratic candidates and programs and policies that are identified by the public with the Democratic party and its current candidate for the presidency.

20. Defendants have thus far caused an unlawful expenditure by Bethlehem Steel in connection with the 1972 Presidential Election Campaign, as aforesaid, of corporate funds and other resources with a total value in excess of $500,000, which wrongful expenditure continues.

COUNT II.

21. This count arises under the common law and the laws of the State of Delaware. Jurisdiction of this court is invoked under the pendent jurisdiction of the federal courts.

22. Plaintiff incorporates herein by reference his averments in Paragraphs 1 through 20 inclusive.

23. Defendants' said acts and expenditures of corporate resources in connection with the election campaign are *ultra vires,* unlawful and constitute willful, wanton and gross breach of their duty owed to said corporation.

WHEREFORE, plaintiff respectfully requests that this Honorable Court enter:

(A) An Order temporarily and permanently restraining and enjoining defendants from any further expenditures of corporate resources, directly or indirectly, in connection with the 1972 Presidential Election Campaign, or any future political campaign.

(B) An Order that defendants immediately place corrective advertising at their own expense in national media under the direction, and subject to the approval of, the Court.

(C) Judgment against defendants jointly and severally and in favor of plaintiff corporation in an amount in excess of $500,000 compensatory damages.

(D) Judgment against defendants jointly and severally and in favor of plaintiff corporation for punitive damages commensurate with their wrongdoing.

(E) Judgment against defendants jointly and severally and in favor of plaintiff for costs of suit, including reasonable attorneys' fees.

(F) Such other further and different relief as appears proper under the circumstances.

CLETUS P. LYMAN, ESQ.,
1612 Latimer Street,
Philadelphia, Pa. 19103

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

RICHARD A. ASH, being duly sworn according to law, deposes and says that he is the plaintiff in the within complaint and is familiar with the facts set forth therein which are true and correct to the best of his knowledge, information and belief.

/s/ RICHARD A. ASH.
Richard A. Ash.

Sworn to and subscribed to before me this 28 day of Sept., 1972.

/s/ NANCY H. BERGMAN.

NANCY H. BERGMAN, *Notary Public,*
PHILADELPHIA, PHILADELPHIA COUNTY,
MY COMMISSION EXPIRES MAY 6, 1976,
Member, Pennsylvania Association of Notaries.

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business—you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016.

This Advertisement is scheduled to appear in: Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

MOTION FOR TEMPORARY RESTRAINING ORDER.

Plaintiff hereby moves the Court for a Temporary Restraining Order against nominal defendant Bethlehem Steel Corporation to issue immediately and to be in force and effect until such time as the Court is able to adjudicate Plaintiff's Motion for Preliminary Injunction served upon counsel of defendants October 6, 1972 and to be formally filed with the Court October 16, 1972 pursuant to Rule 36 of the Local Rules of Civil Procedure. Plaintiff hereby asks the Court for an Order:

Prohibiting Bethlehem Steel Corporation from purchasing or paying for advertising identical to or substantially similar to Exhibit "A" hereof.

In support of this Motion plaintiff incorporates herein by reference the allegations of his verified complaint. Plaintiff further alleges as follows:

(1) that a United States federal election is scheduled for November 7, 1972, approximately 3 weeks from the date hereof;

(2) that Exhibit "A" hereof is primarily directed at influencing the outcome of said election;

(3) that injury to plaintiff caused by the continued placement of advertisements similar to Exhibit "A" prior to said election is irreparable in nature in that said election will result in a final and irreversible selection of office-holders of the United States including the President of the United States.

(4) by virtue of the short period of time remaining prior to the election each day of delay in obtaining relief changes the position of plaintiff to his detriment, and the time required for a hearing on Plaintiff's Motion for Preliminary Injunction will cause a substantial impairment of the relief obtainable by plaintiff; and

(5) no injury will be caused to nominal defendant Bethlehem Steel Corporation by reason of the issuance of the Order here requested.

WHEREFORE plaintiff respectfully requests that said Motion be granted by the Court.

CLETUS P. LYMAN, ESQ.,
1612 Latimer Street,
Philadelphia, Pa. 19103
Attorney for the Plaintiff.

IN THE
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FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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STEWART S. CORT, ET AL.

ORDER.

AND Now, this 13th day of October, 1972, it is hereby ADJUDGED, ORDERED and DECREED as follows: That plaintiff's Motion for a temporary restraining Order is DENIED.

By THE COURT:

/s/ E. MAC TROUTMAN,
E. Mac Troutman, U. S. D. J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT, ET AL.

ANSWER OF DEFENDANTS.

1. Admitted.

2. Admitted.

3. It is admitted that Bethlehem Steel Corporation is the second largest United States steel producer. It is denied that annual gross sales exceed 3.5 billion annually. It is admitted that it maintains plants and offices for the carrying out of its business throughout the United States, including the Eastern District of Pennsylvania.

4. It is admitted that Defendants Cort, Foy, Bickford, Broeker, Reed, Sims, Stott, Baker, Gates, Hobbs, and Jenkins are individuals residing within the United States, who comprise the Board of Directors, Cort being the Chairman of said Board. It is denied that Jess H. Davis, who died prior to the institution of this action is a Director. It is admitted that Defendants Foy, Bickford, Broeker, Reed, Sims and Stott serve additionally as top echelon executives, Foy as its President. It is denied that defendants Bickford, Reed, and Stott are Executive Vice-Presidents.

5. It is admitted that the Directors of Bethlehem Steel Corporation perform the normal policy-making functions

of corporate directors, but it is denied that the Directors participate in each decision relating to the implementation of corporate policy.

6. Admitted.

7. It is admitted that plaintiff is and was at all times relevant hereto the owner of fifty shares of common stock of Bethlehem Steel Corporation. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments that plaintiff is a citizen of the United States, and that plaintiff is registered and qualified to vote in the 1972 United States presidential election.

8. Denied.

9. It is admitted that no demand has been made upon the Directors of Bethlehem Steel Corporation to seek redress directly in connection with plaintiff's allegations. It is denied that the Directors committed, authorized the commission of, or are in any way responsible for or involved in the commission of any illegal or wrongful acts. It is denied that there is any wrongdoing out of which the plaintiff's suit arises.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 10 of the Complaint.

11. Admitted.

COUNT I.

12. Denied.

13. Denied.

14. Each of the averments of paragraph 14 of the Complaint is denied with the exception of the averment that approximately one-half of the shareholders of Bethlehem Steel Corporation are "registered members of the Democratic political party". Defendants are without knowledge or in-

formation sufficient to form a belief as to the truth of the averment that one-half of the shareholders of Bethlehem Steel Corporation are "registered members of the Democratic political party".

15. Denied.

16. Denied as stated.

17. Denied.

18. Denied.

19. Denied. The advertisement referred to in paragraph 19 of the Complaint is not partisan and the expenditures made for publication of the advertisement were not made for the purpose of influencing the nomination for election, or election, of any person to Federal office. The advertisement neither endorses nor disparages the candidacy of any nominee for Federal office. The advertisement does not quote any candidate currently seeking election to Federal office, nor does it single out by name any candidate or political party. On the contrary, the advertisement on its face advocates a non-partisan, issue-oriented approach.

20. Denied.

First Defense.

The Complaint fails to state a claim upon which relief may be granted.

Second Defense.

Defendant Bethlehem Steel Corporation and Defendants Cort, Foy, Bickford, Broeker, Reed, Stott, Sims, Baker, Davis, Gates, Hobbs and Jenkins have not been properly served with process in this action.

Third Defense.

The Court lacks jurisdiction over the person of defendants Cort, Foy, Bickford, Broeker, Reed, Stott, Sims, Baker, Davis, Gates, Hobbs and Jenkins.

Fourth Defense.

The plaintiff lacks standing to sue.

Fifth Defense.

The expenditures referred to in the Complaint were not made for the purpose of influencing the nomination for election, or election, of any person to Federal office.

Sixth Defense.

No expenditures referred to in the Complaint were used for active electioneering.

Seventh Defense.

The Federal Corrupt Practices Act, 18 U. S. C. § 610, as amended by the Federal Election Campaign Act of 1971, is unconstitutional on its face and as applied to defendants herein because:

(1) The Act abridges the freedom of speech guaranteed by the First Amendment of the United States Constitution;

(2) The Act abridges the freedom of press guaranteed by the First Amendment of the United States Constitution;

(3) The Act abridges the freedom of association, the freedom of assembly and the right to petition the Government for a redress of grievances guaranteed by the First Amendment of the United States Constitution;

(4) The Act, in creating a classification of corporations and labor unions creates an arbitrary, unreasonable and invidious discrimination against defendants affecting their exercise of Constitutionally protected

rights, and denies their equal protection of the laws in violation of the Fifth Amendment of the United States Constitution;

(5) The Act arbitrarily and capriciously restricts the exercise of Constitutionally protected rights depriving defendants of due process of law in violation of the Fifth Amendment of the United States Constitution;

(6) In prohibiting "expenditures in connection with any" Presidential election, the Act on its face is unreasonably vague and indefinite in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

COUNT II.

21. Denied.

22. Defendants incorporate by reference the answers to paragraphs 1 through 20, to Count I.

23. Denied.

First Defense.

The Complaint fails to state a claim upon relief can be granted.

Second Defense.

Defendant Bethlehem Steel Corporation and Defendants Cort, Foy, Bickford, Broeker, Reed, Stott, Sims, Baker, Davis, Gates, Hobbs and Jenkins have not been properly served with process in this action.

Third Defense.

The Court lacks jurisdiction over the person of defendants Cort, Foy, Bickford, Broeker, Reed, Stott, Sims, Baker, Davis, Gates, Hobbs and Jenkins.

Fourth Defense.

The Court lacks jurisdiction over the subject matter of Count II.

WHEREFORE, defendants Bethlehem Steel Corporation, Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, C. Thompson Stott, Ivor D. Sims, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs and George P. Jenkins, respectfully request that the Complaint be dismissed and that plaintiff be directed to pay their reasonable expenses including attorneys' fees incurred by reason of this action.

/s/ EDWIN P. ROME,
Edwin P. Rome,
JEROME R. RICHTER,
Attorneys for Defendants,
Bethlehem Steel Corporation,
Stewart S. Cort, Lewis W. Foy,
Edward D. Bickford, Bernard
D. Broeker, Albert M. Reed,
C. Thompson Stott, Ivor D.
Sims, Crowdus Baker, Jess H.
Davis, Thomas S. Gates, Rob-
ert B. Hobbs and George P.
Jenkins.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY,
Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103
215 LO 9-3700

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

MOTION FOR PRELIMINARY INJUNCTION.

Plaintiff hereby moves the Court for a preliminary injunction against nominal defendant Bethlehem Steel Corporation and against the twelve defendants herein, all of whom are directors of Bethlehem Steel Corporation. Plaintiff hereby asks the Court for an Order:

1. Prohibiting individual defendants from causing Bethlehem Steel Corporation to purchase or pay for any advertising in connection with any federal election, including but not limited to advertisements identical or substantially similar to Exhibit "A" hereof.

2. Prohibiting Bethlehem Steel Corporation from purchasing or paying for any advertising in connection with any federal election, including but not limited to advertisements identical to or substantially similar to Exhibit "A" hereof.

3. Directing Bethlehem Steel Corporation to cancel all advertising previously ordered in connection with any federal election, including but not limited to advertisements identical to or substantially similar to Exhibit "A" hereof.

4. Prohibiting Bethlehem Steel Corporation from using its personnel or property for the distribution of advertising materials, copies of speeches, or any other communications whatsoever in connection with any federal election, including but not limited to Exhibit "A" hereof.

5. Prohibiting Bethlehem Steel Corporation from making any expenditures whatsoever in connection with a federal election.

In support of the above requests, plaintiff incorporates herein by reference the allegations of his verified complaint.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman, Esq.,
1612 Latimer Street,
Philadelphia, Pa. 19103

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

STIPULATION OF AGREED UPON FACTS.

AND Now, this 20th day of October, 1972, the following facts are hereby stipulated and agreed to by and between plaintiff and defendants:

1. Bethlehem Steel Corporation (Bethlehem) is a Delaware corporation engaged primarily in the business of steel production, with a principal office in Bethlehem, Pennsylvania.

2. Bethlehem is the second largest producer of steel in the United States, and in 1971 it had net sales of approximately $2,963,602,000 and net income of approximately $139,239,000.

3. Bethlehem had on September 30, 1972 about 202,670 stockholders who owned about 44,469,541 shares of common stock, which were outstanding on that date. The market value of each share of common stock during 1972 has ranged from a high of $34⅝ to a low of $25⅞, and the closing value of a share of common stock on October 16, 1972 was $25⅞. Plaintiff, who owns fifty shares of such common stock, has owned said stock for more than one year.

4. Plaintiff resides in Philadelphia, Pennsylvania, is a United States citizen, and is registered and able to vote in the United States presidential election on November 7, 1972.

5. In connection with the September 11, 1972, mailing of a quarterly dividend to its stockholders, Bethlehem included in the mailing envelope sent to each stockholder a reprint of an advertisement (the "Advertisement") entitled, "I say, let's keep the campaign honest. Mobilize 'truth squads' . . .". A true and correct copy of the Advertisement is attached hereto as Exhibit "A".

6. The Advertisement appeared from on or about August 22, 1972 until September 7, 1972 in various media of national and local circulation, including "Newsweek", "Time", "U. S. News and World Report", "Business Week", "Saturday Review", "Editor and Publisher", and 19 local newspapers in towns in which Bethlehem has plants.

7. Exhibit "B" attached is a true and correct copy of the August 28, 1972, edition of "Time" magazine wherein the Advertisement appeared, facing page number 61.

8. Various magazines in which the Advertisement appeared, including "Time", "Newsweek" and "U. S. News and World Report", are distributed nationally to subscribers and by sale at newsstands throughout the United States.

9. "Time", "Newsweek" and "U. S. News and World Report" are published weekly and have substantial circulation.

10. The Public Affairs Department of Bethlehem as indicated in the Advertisement will send to each person on request a copy of Mr. Cort's speech entitled "Speak Out for Truth", a copy of which is attached hereto as Exhibit

"C", and a copy of a folder entitled "How you can help to keep the campaign honest", a copy of which is attached hereto as Exhibit "D".

11. The placement and purchase of the Advertisement and the printing and mailing of Exhibits "C" and "D" have been, and are being paid for out of the general corporate funds of Bethlehem.

12. Bethlehem may cause the Advertisement to appear in the future in media of national and local circulation.

13. The mailing by Bethlehem of Exhibits "C" and "D", as stated in paragraph 10 hereof, is continuing at present and may continue in the future. Approximately 5,500 copies of Exhibits "C" and "D" have been sent, as stated in paragraph 10 hereof.

14. A Federal election is scheduled for November 7, 1972, at which voters will have an opportunity to vote for electors for the Presidency and Vice-Presidency of the United States, and for various other Federal offices including members of Congress.

15. The Republican party nominee for the Presidency is Richard M. Nixon and the Democratic party nominee is George McGovern.

/s/

Cletus P. Lyman,
Counsel for Plaintiff.

/s/ Edwin P. Rome,
Edwin P. Rome,
Counsel for Defendants.

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business--you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016

This Advertisement is scheduled to appear in: Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

SPEAK OUT FOR TRUTH

by

STEWART S. CORT
Chairman
Bethlehem Steel Corporation

Rotary Club
Jacksonville, Florida
June 12, 1972

Stewart S. Cort

The title of my talk consists of four words of advice: "Speak Out For Truth."

Why do I see this need? Because we've recently lived through a number of political primary campaigns—in Florida and in my own state, Pennsylvania—and it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a long presidential campaign ahead, during which we can clearly see a lot more of the same.

I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community. I'll give you a few examples of what I have in mind:

In a recent speech in Pittsburgh, a prominent presidential candidate said this: "What you have in Washington today is government of the money, by the money, and for the money. We're going to drive the money-changers out of the temple."

At a conference in Washington last month a potential presidential candidate said this: "To me, the ITT case says it all. The doors of the White House are open wide to every chairman of the board, but they are closed tight to the American working man."

As for business taxation, one of the candidates said this: "The time has come for a tax system that says to big business—you must pay your fair share."

That's a reasonable demand, but it implies that we aren't already paying our "fair share." My own company has been tagged with that sort of accusa-

tion despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 *billion* for the 10 years from 1962 through 1971.

So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden.

But corporations aren't the only targets. One candidate talks about "$28 billion in tax loopholes for the rich and powerful" and he calls for tax reform and other economic policies that, in the words of Chet Huntley, are "far to the left of Norman Thomas."

Put it all together and you'll see, as many observers have already warned, that business enterprise is sure to be a major issue during the upcoming presidential campaign. It's bound to be; the temptation is irresistible, at least to anyone who puts political advantage above all else.

As is perfectly clear to you, I don't share the views of those extreme critics of our society. But I certainly do admit that severe criticism is very much in fashion. It has all the earmarks of a vote getter. It'll get votes from the ideological extremes, from both extremes. It'll get votes from those who are terribly disillusioned, frustrated, and fearful. And it'll get votes from people who don't have that one commodity that has always sustained the American people, no matter how unhappy their circumstances --I refer to hope.

A campaign based on cynicism and mistrust will surely meet some measure of success because the way has been cleared by an army of malcontents. They've filled the bookshelves with volumes calling our society *The Sick Society*; branding the nation as *America, Incorporated*; saying we victimize the public *In The Name of Profit* and

deploring what has been called "Consciousness I and II." The illness and the cure are documented in what has been titled *A Populist Manifesto*.

And, when the Committee for Economic Development issued a booklet urging all business firms to accept a high degree of social responsibility, it was greeted with these words, written by one of the most prominent columnists for one of the country's most prominent newspapers:

> "The mania of maximization of profit seems to turn businessmen into economic Richard Specks, people so demented that they will have that last dollar although, if they were sane, they'd know that to make it they must sacrifice their own physical health and well-being."

With that sort of propaganda flooding us, no wonder a recent survey found that 46 percent of all Americans think big business is "dangerous to our way of life." This is plain nonsense. Would nearly every American family have a car if it weren't for so-called "big business"? Would we have telephones and television and indoor plumbing in most homes? Would we have the levels of education and nutrition and health care that, however imperfect, are the envy of most human beings elsewhere on this planet?

Well, I won't take your time defending "big business." Even when the critics aim their blasts at "big business," the fallout injures all businesses, big and small, and a lot of citizens who aren't even "businessmen."

Is this of any concern to you? You bet it is! Consider, for a moment, the current epidemics of shoplifting and vandalism. Sure, we've always had to contend with larceny and destructive individuals, but has this kind of conduct ever before been condoned by whole groups in our society? Today the so-called "rip-off" has become a sort of art form and

a folk religion.

Are businessmen the only ones who suffer because of shoplifting? You know the answer. We all suffer because of the resulting higher prices. We all pay the high costs of preventing vandalism and repairing its damages.

And let me read you a sad little item that appeared in one of our local newspapers on May 13th:

> "The owners of a shop in Allentown wanted to run a store which sold things to kids at reasonable prices, that didn't 'rip-off' the customers. In appreciation, the shoplifters went to work on them. 'The kids steal anything they can get their hands on and put in their pockets,' said one proprietor. 'We try to sell things at a low price, but it seems some people just have to steal'."

I don't think I have to add anything to that newspaper story. It speaks for itself. Ask yourself whether the situation will improve, or get worse, if the upcoming political campaign features the nation's leading politicians preaching that business is evil, that it makes excessive profits by gouging and cheating and deceiving the American public. It's something to think about.

Now let's take a look at another specific issue that ought to concern you and me. Everybody's talking about tax reform, but watch out for rhetoric about "closing the loopholes" that only benefit "the rich and powerful." As *The Wall Street Journal* commented the other day, one of the biggest so-called "loopholes" is the provision enabling homeowners to deduct mortgage interest and property taxes from Federal taxable income.

Well, there are many millions of homeowners in this country and they aren't all "rich and powerful." Most of them are just ordinary citizens. And, as a matter of fact, I always thought there was a

sound public policy behind those deductions—to encourage people to own their own homes. Take the deductions away and I doubt you'd prevent wealthy people from owning homes, but you'd surely make it tough on everybody else.

And, talking about personal income taxes, is there a single person here who thinks his taxes are too low? Well, there are candidates who think they're *way* too low.

And that's only the beginning. There are proposals to virtually confiscate inheritances over a certain amount; to end the tax exemption for state and municipal bonds; to reduce depletion and depreciation allowances; to outlaw the tax limitations on capital gains—you name it, somebody's talking about it.

But there's no need for me to go on and on. You've heard all those proposals, and I hope you see them as I do—not so much as threats to people who are wealthy, but threats to everyone who asks nothing more than the same opportunities that Americans have always had.

In fact, the avowed purpose of all those proposals is to give the government even greater power to redistribute income.

Now, don't get me wrong. The stated objectives are very worthy—to use that power to stamp out poverty; to improve health care; to provide jobs for every American; to eliminate the inequities in our society.

All those aims are wholly admirable and we should strive to achieve them. But is this the way to do it? I can't imagine how destroying individual incentive and confiscating savings can possibly provide more employment. It would, in fact, have the opposite effect.

But I won't quibble over specific points. Let me focus on the broadest aspect of this thing, and

that's the really important issue. What I have in mind is nothing less than individual freedom. The kind of collectivized society those people are talking about is the greatest threat on earth to our freedom.

In mid-May William F. Buckley gave a talk in my community. I wasn't able to attend, but the next morning's paper reported this:

> "Mr. Buckley said there is an increasing tendency of Americans to trade in their many freedoms for bits of economic and social security."

How right he is! Now, just by coincidence, another article appeared in the very same edition of the paper. It was a dispatch from the *Times* of London; maybe it appeared in your local papers.

It summarized a report from Sweden, and Sweden, as you probably know, is the most highly socialized country in the western world. The headline of this article was: "Sweden has harsh, ruthless society, report confirms."

The Swedes have free health care and cradle-to-grave security. But what does it cost them?

They have just about the highest prices in the world; they consume more alcohol per capita than any other people in the world; and they are suffering what amounts to an epidemic of mental breakdowns.

In the interests of equality, most things in Sweden are standardized. In the words of the report: "It is true that if you have seen one Swedish town, you've seen them all .... Swedish flats and houses are so much alike that you can enter any kitchen in the country and usually know where the rubbish bin is located." How'd you like living under those conditions?

But here's the worst part of it. Listen to this: "Many observers believe that some chilling aspects of the '1984' society appeared in Sweden several years ago." This type of society, writes the Swed-

ish psychiatrist who prepared the report, "leads to a prodigious, human-crushing process."

Is that what the so-called "populist" movement in America really wants—to crush the human spirit? One of the great ironies of it all is that the populist movement is seen as a rebirth of Jeffersonian philosophy. Now, that's a strange thing, because I've checked into what Thomas Jefferson thought this country is all about, and his ideas are remarkably fitting today.

Listen to these words on taxation and government spending, written in 1816:

> "... private fortunes are destroyed by public as well as by private extravagance. And this is the tendency of all human governments .... till the bulk of society is reduced to mere automatons of misery, to have no sensibilities left but for sinning and suffering .... And the fore horse of this frightful team is public debt. Taxation follows that, and in its train wretchedness and oppression."

As sure as I'm standing here, the economic programs now being preached by some political candidates would, if implemented, bring an end to democracy and freedom as we know it in this land, not overnight, but in the foreseeable future.

This is not to say that continual and gradual changes in our society aren't needed, and needed badly. There's still a lot of inequity in our land; there's a lot of poverty; there's a lot of suffering that must be remedied. But we must find a way to do it that doesn't stop our economy in its tracks—a way that doesn't wipe out the individual liberties that have made us a proud country, with every right to be proud.

That's more than enough moralizing. I'm not a philosopher; I'm a practical man. And that's why

I'd like to give a few practical suggestions. The political campaigns are coming. And, as I've pointed out, we know what a lot of the candidates are going to be saying. I say, let's keep them honest.

Right now, look at their declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups like this one, groups with a deep interest in good government, organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

One thing you can do is talk in advance with the communications media in this area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action.

I've quoted Thomas Jefferson before and I'll quote him just one more time. It seems that Jefferson didn't like long-winded speeches. In 1824, in a letter to the president of a debating society, he said this: "Amplification is the vice of modern oratory. It is an insult to an assembly of reasonable men, disgusting and revolting instead of persuading. Speeches measured by the hour, die with the hour." That's good advice, and I'll follow it. Thank you!

Public Affairs Department
Bethlehem Steel Corporation
Bethlehem, PA 18016

Booklet 2901 728, Printed in U.S.A.

How you can help to keep the campaign honest

There are many things you can do—either as an individual, or as a member of an organization—to help promote responsible, truthful campaigning by political candidates. We urge your full participation.

Become informed. Determine what the major issues are in this year's elections—such as Vietnam, inflation, taxes, unemployment, environment, foreign affairs, busing, and law and order. Read books, magazines, periodicals, and reports to gain background; read newspapers to follow current trends. Make a habit of watching televised news programs, and listening to radio reports. Discuss the issues with your friends, neighbors, and business associates.

In addition, find out what the candidates stand for. What are their proposals and political philosophy? What have their records been on major issues? What are their qualifications for office?

Prepare. Forewarn the communications media about possible false statements that could be made by political candidates. Also, advise newspaper publishers, editors, reporters, radio and television people, and magazine publishers of any fallacies in the political programs of candidates. Use

facts and illustrations, and give them the sources of your material.

If you work for a fairly large business organization, see to it that your sales people and legislative representatives are advised to report any false or misleading statements that come to their attention, so that appropriate rebuttal can be made. Encourage your executives to accept speaking engagements and to urge their audiences to keep candidates honest.

Be inquisitive. Scrutinize articles and speeches by candidates. When you encounter a statement that seems unlikely, or is inconsistent with your own knowledge, check on it. Your sources, of course, will vary with the subject you are researching, but the following may be useful to you: The Readers Guide to Periodical Literature, and the Public Affairs Information Service at your local library include a listing of current books, magazine and periodical articles, and government documents. Also, use encyclopedias and almanacs; informational services of chambers of commerce, and other local business associations. Keep in touch with the public affairs or public relations offices of major corporations or of national organizations such as the National Association of Manufacturers, the Chamber of Commerce of the United States, and various trade associations or technical societies. Or ask the candidate himself to provide the source of his information. If the facts contradict the statement you are researching, document your sources.

Correct the record. If you are attending an open meeting at which a political candidate—or anyone else—makes a statement you know to be wrong, stand up and question him, perhaps during the question and answer session. If that is not possible, or if you hear or read such a statement in the news media, write to the candidate, the radio and television stations or newspapers which publicized the incorrect information, and perhaps to local newspapers in areas where the statement was heard

or read. Make your communications positive in tone; cite relevant facts and figures to prove your point.

Follow up. To the extent possible, check future statements of the candidate to be sure he has corrected the wrong information he has been using. If he has, write and thank him. If not, some of the following steps might be indicated: write or wire the local, state, or national leader of the candidate's political party, asking that he or she intervene; write or telephone officials of your local news media, suggesting that they prepare an editorial on the situation and that they discuss the issue in their news articles or programs. Communicate again with the candidate, telling him of the steps you have taken and strongly urging him to correct the wrong information he is using.

Talk with people. Talk with everyone with whom you come in contact about your efforts to promote responsible campaigning. Discuss the incorrect statements that have been made, and tell your listeners who made them. Encourage them to become active in their own localities.

Finally, form "Truth Squads." Involve your friends, neighbors, church groups, business organizations, civic clubs and schools in the effort to promote truthful, honest political campaigning. Divide the research and communication work among members of the Squad and meet periodically to discuss issues and projects, and to share information. Have each participant communicate with the officials suggested above in every instance where an irresponsible or incorrect statement is identified.

Public Affairs Department
Bethlehem Steel Corporation
Bethlehem, PA 18016

Folder 2902 728, Printed in U.S.A.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

AMENDED MOTION FOR PRELIMINARY INJUNCTION.

Plaintiff hereby amends his motion for preliminary injunction and asks that the Court grant a preliminary injunction against corporate defendant Bethlehem Steel Corporation *only* in accordance with a proposed preliminary injunction, findings of fact and conclusions of law submitted herewith.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia 19103
Counsel for Plaintiff.

IN THE
UNITED STATES DISTRICT COURT.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104
ON BEHALF OF HIMSELF, AND
ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS,
ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION
AND
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

TROUTMAN, *J.* October 25, 1972.

The Court, having considered the verified complaint, the answer and a stipulation of facts entered into by respective counsel and having heard oral argument, now makes the following findings of fact and conclusions of law pursuant to F. R. Civ. P. 52(a).

FINDINGS OF FACT.

1. Plaintiff resides in Philadelphia, Pennsylvania, is a United States citizen, and is registered and able to vote in the United States presidential election on November 7, 1972.

2. Plaintiff is and was at all times relevant hereto the owner of fifty shares of common stock of Bethlehem Steel Corporation.

3. Bethlehem Steel Corporation (Bethlehem) is a Delaware corporation engaged primarily in the business of steel production, with a principal office in Bethlehem, Pennsylvania.

4. Bethlehem is the second largest producer of steel in the United States, and in 1971 it had net sales of approximately $2,963,602,000 and net income of approximately $139,239,000

5. Bethlehem had on September 30, 1972 about 202,670 stockholders who owned about 44,469,541 shares of common stock, which were outstanding on that date. The market value of each share of common stock during 1972 has ranged from a high of $34⅝ to a low of $25⅞, and the closing value of a share of common stock on October 16, 1972 was $25⅞.

Plaintiff, who owns fifty shares of such common stock, has owned said stock for more than one year.

6. In connection with the September 11, 1972, mailing of a quarterly dividend to its stockholders, Bethlehem included in the mailing envelope sent to each stockholder a reprint of an advertisement (the "Advertisement") entitled, "I say, let's keep the campaign honest. Mobilize 'truth squads' . . ." (Exhibit A).

7. The advertisement appeared from on or about August 22, 1972 until September 7, 1972, in various media of national and local circulation, including "Newsweek", "Time", "U. S. News and World Report", "Business Week", "Saturday Review", "Editor and Publisher" and nineteen local newspapers in towns in which Bethlehem has plants.

8. Various magazines in which the advertisement appeared, including "Time", "Newsweek" and "U. S. News and World Report" are distributed nationally to subscribers and by sale at newsstands throughout the United States.

9. "Time", "Newsweek" and "U. S. News and World Report" are published weekly and have substantial circulation.

10. The Public Affairs Department of Bethlehem as indicated in the advertisement will send to each person on request a copy of Mr. Cort's speech entitled "Speak Out for Truth", and a copy of a folder entitled "How you can help to keep the campaign honest".

11. The placement and purchase of the advertisement and the printing and mailing of Mr. Cort's speech and the folder entitled "How you can help to keep the campaign honest" have been, and are being paid for out of the general corporate funds of Bethlehem.

12. Bethlehem may cause the advertisement to appear in the future in media of national and local circulation.

13. The mailing by Bethlehem of Mr. Cort's speech and the folder entitled "How you can help to keep the campaign honest" is continuing at present and may continue in the future. Approximately 5,500 copies of the speech and folder have been sent.

14. A Federal election is scheduled for November 7, 1972, at which voters will have an opportunity to vote for electors for the Presidency and Vice-Presidency of the United States, and for various other Federal offices, including members of Congress.

15. The advertisement, the speech and the folder do not mention by name any person currently a candidate for any local, state or Federal office, and they do not endorse or disparage the candidacy of any person currently seeking election to any local, state or Federal office.

16. The advertisement, the speech and the folder state a variety of viewpoints on issues which voters may face in the upcoming elections, without identifying any particular candidate with any particular political view.

DISCUSSION.

Beginning on August 22, 1972, the "advertisement" about which plaintiff complains appeared in various news media and was distributed to shareholders of the defendant corporation, Bethlehem Steel Corporation, on September 11, 1972. On October 16, 1972, plaintiff formally filed a complaint seeking a preliminary injunction restraining such advertisement. On October 11, 1972, at about 5 P. M., plaintiff applied for a temporary restraining order. After notice, hearing was held on October 13, 1972, and said ap-

plication was denied. Thereafter, the parties conferred and appeared before the Court on October 20, 1972, submitting a stipulation of facts in lieu of testimony, upon which we base the foregoing "findings of fact". Proposed amended findings and conclusions were submitted to the Court on October 24, 1972, and because of the coming Federal election on November 7, 1972, plaintiff seeks an immediate decision. Therefore, time does not permit the preparation and filing of an expanded and detailed discussion and opinion.

For the purpose of this application for a preliminary injunction, it is sufficient to say that a party seeking a preliminary injunction must establish by clear, positive proof the existence of four essential preconditions to the granting of injunctive relief: (1) irreparable harm to himself absent an injunction; (2) the absence of substantial harm to the defendants; (3) the absence of harm to the public interest; and (4) a likelihood that he will prevail on the merits. *Winkleman v. N. Y. Stock Exchange,* 445 F. 2d 786, 789 (3d Cir. 1971); *Nelson v. Miller,* 373 F. 2d 474, 477 (3d Cir. 1967). Failure to adequately establish at least a reasonable probability of success on the merits justifies denial of an injunction on this ground alone. *Industrial Electronics Corp. v. Cline,* 330 F. 2d 480, 482 (3d Cir. 1964).

Title 18 U. S. C. § 591, as amended, defines, as follows, the term "expenditure" as otherwise used in the Act:

"(f) 'expenditure' means—

'(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), *made for the purpose of influencing the nomination for election, or election, of any person to Federal office,* for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

'(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable to make any expenditure; and

'(3) a transfer of funds between political committees.' " (Emphasis supplied)

Thus, as defined, it contemplates a specific purpose; i.e., influencing the election of a person to Federal office. Title 18 U. S. C. § 610 then continues:

"§ 610. *Contributions or expenditures by national banks, corporations, or labor organizations.*

"As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; non-

> partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization; PROVIDED, that it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction."

It is a criminal statute imposing, for its violation, a fine and penalty.

Thus, at the very threshhold, the plaintiff must establish an implied cause of action under said statute. Civil actions may be implied from criminal statutes designed to protect a specific class. *Common Cause v. Democratic National Committee,* 333 F. Supp. 803 (D. D. C. 1971). The purpose of Section 610 is to assure a popularly elected government for all the people in the United States and its main concern is to "eliminate the effect of aggregated wealth in Federal elections". *Pipefitters Local Union No. 562 et al. v. United States,* — U. S. — (June 22, 1972). True, a secondary concern of Section 610 is to protect dissenting or minority shareholders, of which plaintiff is one. Thus, since the *primary* purpose of the Act was to protect the public, rather than dissenting shareholders, a substantial showing of congressional intent is required to provide an implied cause of action. Congress expressly

vested in the Department of Justice the authority to enforce the Act. The sanctions imposed are purely penal in nature. On this record, we cannot hold, as plaintiff contends, that a private cause of action must be implied because the Department of Justice resources are inadequate to enforce the Act and thereby are inadequate to protect the public interest. Neither can we assume the partisan enforcement of the Act as plaintiff suggests. We, therefore, hold that the penal sanctions imposed are exclusive and that no private cause of action is implied. *Chavez v. Freshpict Foods, Inc.,* 456 F. 2d 890 (10th Cir. 1972). For this reason alone an injunction must be denied.

The second issue arises, namely, whether the advertisement constitutes a violation of Section 610, which proscribes any expenditure or contribution to a candidate, campaign committee, political party or organization in connection with any Federal election. Section 591 defines expenditure as used in Section 610 as ". . . anything of value . . . for the purpose of influencing the nomination for election or election of any person to federal office." Here, the ostensible purpose—apparent on the face of the advertisement—is to mobilize and seek honest campaigns. Only incidentally does it seek to refute the statement of an unnamed candidate for political office. There is nothing in the Act which suggests a corporation or a labor union must sit idly by as accusations are being made against it or the industry or segment of the business community of which it is a part. The advertisement or article is not directed to the election of a specific person or persons or, indeed, of any persons to Federal office, as contemplated by 18 U. S. C. § 591(f). Neither is it directed to a specific candidate, campaign committee, political party or organization, as contemplated by 18 U. S. C. § 610.

We conclude that the purpose of the advertisement was not to influence the election of a specific candidate, but

rather to seek an honest campaign and election and, incidentally, to respond to an accusation leveled against the business community. Thus, the payment for the advertisement did not constitute an "expenditure" within the meaning of Section 591(f) and Section 610.

A third issue arises in that defendants challenge the constitutionality of the Act. We need not reach the constitutional issue. Under the facts and circumstances of this case, we have construed the term "expenditure" to exclude a situation where, as here, a corporation (or a labor union) expends its general funds to communicate to the public (a) its views as to honest campaigns and elections, an issue vital to its corporate interest and to the public; (b) its views as to a statement made by an unnamed candidate for election aimed at the community of which it is a part; and (c) without advocating the election of any particular person or party.

In thus construing the term "expenditure", we need not decide whether the statute is overbroad in that it unduly infringes upon the First Amendment rights of either corporations or labor unions.

Accordingly, on the basis of the record before us, we make and enter the following

CONCLUSIONS OF LAW.

1. The Court has subject-matter jurisdiction over Count I of the complaint, pursuant to 28 U. S. C. § 1331.

2. The Court has personal jurisdiction over defendant, Bethlehem Steel Corporation.

3. Plaintiff has failed to prove that there is a likelihood of success on the merits, in that:

(a) plaintiff has no private right of action under 18 U. S. C. § 610;

(b) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech and the folder are not "contributions or expenditures" within the meaning of 18 U. S. C. § 610;

(c) the expenditures made by Bethlehem Steel in connection with the advertisement, the speech and the folder are not "expenditures" made for "the purpose of influencing the nomination for election, or the election of any person to Federal office" and, hence, are not "expenditures" within the meaning of 18 U. S. C. § 591(f)(1).

(d) the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech, and the folder did not constitute "active electioneering directed at the general public on behalf of a candidate in a Federal election" as defined in the legislative history to the recent amendment of 18 U. S. C. § 610; Congressional Record, November 30, 1971, H 11477, 11478;

(e) to enjoin the expenditures made by Bethlehem Steel Corporation in connection with the advertisement, the speech, and the folder would prevent a corporation from seeking an honest campaign and election and refuting a statement made by an unidentified candidate, which is adverse to its interest, thereby giving rise to grave First Amendment issues;

(f) under the facts and circumstances of this case, 18 U. S. C. § 610 must be narrowly construed to avoid an overbroad application infringing on a corporation's (and labor union's) First Amendment right to seek an honest campaign and to refute statements on issues of crucial concern to it and to the public, thus preventing a public debate on such issues.

4. Plaintiff has failed to prove that injunctive relief would not cause substantial harm to defendants.

5. Plaintiff has failed to prove that injunctive relief would not be harmful to the public interest.

6. In failing to prove a likelihood of success on the merits, plaintiff has failed to prove that irreparable harm would result if an injunction is not granted.

A preliminary injunction will be denied.

ORDER.

AND NOW, this 25th day of October, 1972, IT IS ORDERED that plaintiff's motion for a preliminary injunction will be, and the same is hereby, DENIED.

/s/ E. MAC TROUTMAN, *J.*

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business—you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we aren't already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016.

This Advertisement is scheduled to appear in: Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT, ET AL.

NOTICE OF APPEAL.

Notice is hereby given that plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the order denying plaintiff's motion for a preliminary injunction entered in this action on October 27, 1972.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia, Pa. 19103
Attorney for Plaintiff-Appellant.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1984

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104

ON BEHALF OF HIMSELF,
AND ON BEHALF OF

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Appellant

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES,

ROBERT B. HOBBS
GEORGE P. JENKINS

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORTATION,
Defendants

AND

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Nominal Defendant

(D. C. Civil Action No. 72-1925)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued December 15, 1972

Before SEITZ, *Chief Judge,* and ALDISERT and
ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 5, 1973)

CLETUS P. LYMAN, Esq.
Phila., Pa.
Attorney for Appellant

EDWIN P. ROME, Esq.
JEROME R. RICHTER, Esq.
WILLIAM H. ROBERTS, Esq.
Phila., Pa.
Attorneys for Appellees

PER CURIAM:

This is an appeal from a denial of a request for preliminary relief seeking to enjoin Bethlehem Steel from furnishing funds for the publication and dissemination of copies of a speech made by the corporation's president. Appellant alleged that this practice offended 18 U. S. C. §§ 591, 610, governing the conduct of federal elections and political activities. We affirm the denial of the request for a preliminary injunction. Our holding is narrowly limited. We affirm solely because we view as not clearly erroneous the district court's finding that appellant would not be irreparable harmed by the denial of his request.

Although the court reached other legal considerations which facially would seem to preclude appellant from proceeding to final hearing, we were assured at oral argument by counsel for appellees that he considered those conclusions to have been preliminary only and limited to the context of the request for preliminary relief. He conceded that appellant would be free to present anew his original contentions in the district court as the case proceeds to final adjudication. We therefore conclude that appellant is not foreclosed from reasserting at final hearing his contentions of standing and statutory construction of 18 U. S. C. §§ 591, 610 and, thus, do not meet these questions nor the issue of mootness.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1984.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104

ON BEHALF OF HIMSELF,
AND ON BEHALF OF

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,

Appellant,

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
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ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORTATION,
Defendants

AND

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Nominal Defendant

(D. C. Civil No. 72-1925)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and ALDISERT and ROSENN, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 27, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ THOMAS F. QUINN,
Clerk.

January 5, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

ON BEHALF OF HIMSELF
AND ON BEHALF OF

BETHLEHEM STEEL CORPORATION,
Plaintiff,

v.

STEWART S. CORT, ET AL.,
Defendants.

MOTION FOR SECURITY FOR EXPENSES.

Defendants, Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, C. Thompson Stott, Ivor D. Sims, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs, George P. Jenkins, and Bethlehem Steel Corporation ("Bethlehem") by their attorneys, Blank, Rome, Klaus & Comisky, respectfully move your Honorable Court pursuant to Act of May 5, 1933, P. L. 364, Art. V, § 516, added Act of August 27, 1963, P. L. 1355, § 1, as amended Act of July 20, 1968, P. L. —, No. 216 § 32 (15 P. S. § 1516, Pennsylvania Business Corporation Law, § 516B), for an Order requiring plaintiff to post security for expenses in the above captioned matter.

The following reasons are advanced in support of this Motion:

1. This is a suit brought to enforce secondary rights on the part of a stockholder against the directors of Bethlehem and Bethlehem.

2. Plaintiff is a holder of 50 shares of common stock of Bethlehem, which is less than five (5) percent of the outstanding shares of such common stock. Bethlehem had on January 5, 1973, about 44,468,446 shares of common stock outstanding, and the closing value of a share of common stock on January 5, 1973 was $29½.

3. Each individual defendant is a director of Bethlehem and at all times alleged in the Complaint, acted in good faith, in a manner he reasonably believed to be in the best interests of Bethlehem, and his conduct was not unlawful. Furthermore, in so acting, each defendant was neither negligent nor guilty of misconduct in performance of his duties to Bethlehem. Bethlehem and the directors deny any unlawful, improper or wrongful acts as alleged in the Complaint.

4. Plaintiff has made no effort to verify the truth of the material allegations made in his Complaint, and he has no reasonable belief in the truth thereof. This law suit is of a frivolous and harassing nature, in which plaintiff has no real likelihood of success.

WHEREFORE, defendants respectfully move Your Honorable Court to enter an Order requiring plaintiff to post bond as security for reasonable expenses in the amount of $100,000.00.

BLANK, ROME, KLAUS & COMISKY,
By: /s/ EDWIN P. ROME,
Edwin P. Rome,
JEROME R. RICHTER,
Attorneys for Defendants.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1984.

RICHARD A. ASH, ETC.
Appellant,

v.

STEWART S. CORT, ETC., ET AL.

ORDER SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, and HUNTER, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ ALDISERT,
Judge.

Dated: January 31, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH,
ON BEHALF OF HIMSELF AND ON BEHALF OF
BETHLEHEM STEEL CORPORATION

v.

STEWART S. CORT, ET AL.

ORDER.

TROUTMAN, *J.*

AND Now, this 7th day of March, 1973, upon consideration of this written motion and briefs submitted by the parties, IT IS ORDERED that defendants' motion for security for expenses as it relates to Count I of plaintiff's complaint is DENIED. As to Count II, IT IS FURTHER ORDERED that the plaintiff post a bond with the Clerk of this Court in the amount of $35,000.00 as security for expenses pursuant to the provisions of Section 516(b) of the Pennsylvania Business Corporation Act, 15 P. S. §1516 and that such bond be posted within ten (10) days of the date of this order. Construing Section V of plaintiff's preliminary memorandum as a motion for leave to amend the complaint, IT IS FURTHER ORDERED that such motion is GRANTED. IT IS FURTHER ORDERED that defendants' objections to plaintiff's interrogatories and request for documents as they relate to this motion are SUSTAINED.

/s/ E. MAC TROUTMAN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104

ON BEHALF OF HIMSELF,
AND ON BEHALF OF
BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,

Plaintiff,

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES,

ROBERT B. HOBBS
GEORGE P. JENKINS,

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORTATION,
Defendants

AND

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,
Nominal Defendant

FIRST AMENDED COMPLAINT.

1. Plaintiff Richard Ash is an individual residing at the Plaza Apartment, 18th & Benjamin Franklin Parkway, Philadelphia, Pennsylvania.

2. Nominal defendant, Bethlehem Steel Corporation (Bethlehem Steel) is a Delaware corporation with principal office located at 701 East Third Street, Bethlehem, Pennsylvania, engaged, *inter alia,* in the business of steel production, distribution and sale.

3. Bethlehem Steel is the second largest United States steel producer with annual gross sales in excess of $3.0 billion annually. It maintains plants and offices for the carrying out of its business throughout the United States, including the Eastern District of Pennsylvania.

4. Defendants Stewart S. Cort, Lewis W. Foy, Edward D. Bickford, Bernard D. Broeker, Albert M. Reed, Ivor D. Sims, C. Thompson Stott, Crowdus Baker, Jess H. Davis, Thomas S. Gates, Robert B. Hobbs and George P. Jenkins, are individuals residing within the United States, who

comprise the Board of Directors of Bethlehem Steel, Cort being the Chairman of said Board. Foy, Bickford, Broeker, Reed, Sims and Stott serve additionally as top echelon executives of said company; Foy as its President; and the others as Executive Vice Presidents.

5. By virtue of their said positions with Bethlehem Steel, defendants control the policy making of the corporation, its implementation of such policies, and the disbursement of corporate funds pursuant to and in furtherance of such policies.

6. Bethlehem Steel is a publicly held corporation whose stock is traded and listed on the New York Stock Exchange. Its stock is widely distributed to in excess of 200,000 holders, a substantial number of whom live within the United States and within the Eastern District of Pennsylvania.

7. Plaintiff is, and was at all times herein material, the owner of 50 shares of Bethlehem Steel stock. He is, in addition, a citizen of the United States, registered and qualified to vote in federal and state elections, including the 1972 United States presidential election.

8. Plaintiff brings this action in an individual capacity as a shareholder, a United States citizen and a qualified member of the United States electorate as aforesaid and derivatively on behalf of Bethlehem Steel and alleges that he is well able to fairly, ably and effectively represent the rights and interests of said corporation.

9. No demand has been made upon the Directors of Bethlehem Steel to seek similar redress directly, because said Directors are involved in and responsible for the wrongdoing out of which plaintiff's suit arises.

10. No request for concerted action has been made to plaintiff's fellow shareholders in Bethlehem Steel, because they are too numerous and too widely scattered to make such request practicable.

11. This action is not a collusive one to confer jurisdiction upon a court of the United States which it would not otherwise have.

12. This Complaint arises out of alleged violation by defendants of the criminal statutes of the United States governing elections and political activities, commonly known as the Federal Corrupt Practices Act, specifically Title 18, Section 610, U. S. C. A. of said Act, and the private remedy for redress of grievances implied under said Act. Jurisdiction is involved under Title 28, Section 1331, U. S. C. A., the amount in controversy exceeding the sum of $10,000, exclusive of interest and costs.

13. At some time in 1971 or 1972, defendants entered into a plan involving the utilization of Bethlehem Steel's resources, including the expenditure of its funds, in connection with the 1972 United States presidential election.

14. The ultimate purpose of said plan was to influence the United States electorate to help bring about a Republican Party victory in said election. This purpose was solely in furtherance of the individual interests and beliefs of defendants and was in violation of state and federal law, and in derogation of the rights of the United States public, and of the approximate one half of the shareholders of Bethlehem Steel that are registered members of the Democratic political party.

15. Thereafter, in furtherance of said plan and purpose, defendants caused corporate resources to be utilized, including the expenditure of substantial funds in connection

with said political campaign, including, *inter alia,* their causing to be prepared and disseminated at corporate expense, an advertisement entitled "I Say Let's Keep the Campaign Honest. Mobilize 'Truth Squads' . . .", attributed to defendant Cort. (A copy of said advertisement is attached hereto and made part hereof as Exhibit "A".)

16. Said advertisement was communicated to the United States' electorate as aforesaid, *inter alia,* by insertion in various magazines of national circulation, including Newsweek, Time, U. S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and in various local newspapers, and by a direct mailing, to Bethlehem Steel shareholders.

17. The aforesaid actions by defendants have been and are in violation of said Federal Election law, which states *inter alia:*

> "It is unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for. . . ." Title 18, Sec. 610, U. S. C. A.

18. The said actions by defendants are, *a fortiori,* unlawful in that they involve the utilization of corporate resources for partisan political purposes in connection with said presidential election, pursuant to defendants' plan and purposes.

19. The said advertisement is blatantly partisan on its face, in that it in essence calls for the mobilization of "truth squads" to keep the campaign honest, on the basis of the following factors extracted therefrom:

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

* * *

"As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: 'The time has come for a tax system that says to big business—you must pay your fair share.'" (Exhibit "A")

All of which factors can only reasonably be imputed to activities of Democratic candidates and programs and policies that are identified by the public with the Democratic party and its current candidate for the presidency.

20. Defendants have caused an unlawful expenditure by Bethlehem Steel in connection with the 1972 Presidential Election Campaign, as aforesaid, of corporate funds and other resources with a total value in excess of $500,000.

21. Defendants presently intend to cause Bethlehem Steel to make further similar and unlawful expenditures of corporate resources in connection with future federal elections.

WHEREFORE, plaintiff respectfully requests that this Honorable Court enter:

(A) Declaratory judgment against defendants jointly and severally finding their conduct as alleged unlawful.

(B) An Order temporarily and permanently restraining and enjoining defendants from any further expenditures or contributions in connection with any federal election.

(C) Judgment against defendants jointly and severally and in favor of Bethlehem Steel in an amount in excess of $500,000 compensatory damages.

(D) Judgment against defendants jointly and severally and in favor of plaintiff corporation for punitive damages commensurate with their wrongdoing.

(E) Judgment against defendants jointly and severally and in favor of plaintiff for costs of suit, including reasonable attorneys' fees.

(F) Such other and further and different relief as appears proper under the circumstances.

CLETUS P. LYMAN,
1612 Latimer Street,
Philadelphia 19103
Attorney for Plaintiff.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

RICHARD A. ASH, being duly sworn according to law, deposes and says that he is the plaintiff in the within complaint and is familiar with the facts set forth therein which are true and correct to the best of his knowledge, information and belief.

/s/ RICHARD A. ASH
Richard A. Ash.

Sworn to and subscribed to before me this 19th day of March, 1973.

/s/ NANCY H. BERGMAN
Nancy H. Bergman, Notary Public
Philadelphia, Philadelphia County
My Commission expires May 6, 1976
Member, Pennsylvania Association of Notaries

"I say let's keep the campaign honest. Mobilize 'truth squads'..."

Stewart S. Cort, *Chairman*
Bethlehem Steel Corporation

"Why do I see this need? Because several months ago we lived through a number of political primary campaigns. And it ought to be clear to all of us that there have been times when truthfulness took an awful beating. And now we have a presidential campaign ahead, during which we can clearly see a lot more of the same.

"I'm thinking of the careless rhetoric and accusations that are being thrown around these days—their main target being the business community.

"Right now, look at every candidate's declared political programs. Analyze every issue. If you think any of them are faulty, ill-founded, or misleading, prepare your own answers and use those answers to set the record straight. I'd suggest that groups with a deep interest in good government organize programs to encourage responsible, honest, and truthful campaigning. Mobilize "truth squads," perhaps.

"One thing you can do is talk in advance with the communications media in your area—newspaper publishers, editors, reporters, radio and television people, and magazine publishers. Alert them to the kinds of false statements that are likely to be made and show them how and why those statements are false or deceptive. Give them the facts. They're likely to take a highly responsible position in reporting what the politicians say if they're forewarned.

"And when outrageous accusations are reported in the media, you ought to refute them immediately. You can do it if you're properly prepared. Plan to attend political functions and stand up when spokesmen are off base. Concerned citizens ought to do this; it's nothing more than true democracy in action."

From a talk "SPEAK OUT FOR TRUTH" to the Rotary Club, Jacksonville, Florida.

As an example of the careless rhetoric and accusations about the business community, Mr. Cort quoted the following statement made by a political candidate: "The time has come for a tax system that says to big business—you must pay your fair share."

His answer: "That's a reasonable demand, but it implies that we are not already paying our 'fair share.' My own company has been tagged with that sort of accusation despite the fact that over the past 10 years our taxes have averaged $37 million a year more than our net income. Our total tax expense was nearly $200 million last year, $155 million in 1970, and more than $1.7 billion for the 10 years from 1962 through 1971.

"So please think twice before swallowing all this baloney about large corporations not carrying their fair share of the tax burden."

If you would like a copy of Mr. Cort's entire speech "SPEAK OUT FOR TRUTH," and if you would like a folder telling how to go about activating *Truth Squads*, write: Public Affairs Dept., Bethlehem Steel Corporation, Bethlehem, PA 18016

This Advertisement is scheduled to appear in: Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, and 19 Plant Town Newspapers, the Washington Post, and the Wall Street Journal.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

MOTION.

RICHARD A. ASH,
Plaintiff,

v.

STEWART S. CORT, ET AL.,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Defendants move the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in the defendants' favor dismissing the claim alleged in Count I of the Complaint on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law, and dismissing the claim alleged in Count II of the Complaint on the ground that, defendants being entitled to judgment as to Count I, the Court lacks jurisdiction over the subject matter of the pendent claim alleged in Count II.

Of Counsel:
BLANK, ROME, KLAUS
& COMISKY,
1100 Four Penn Center
Plaza,
Philadelphia, Pennsylvania
19103

/s/ EDWIN P. ROME,
Edwin P. Rome,
JEROME R. RICHTER,
WILLIAM H. ROBERTS,
Attorneys for Defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH,
Plaintiff,

v.

STEWART S. CORT, ET AL.,
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY,
Four Penn Center Plaza,
Philadelphia, Pennsylvania.
19103

EDWIN P. ROME,
JEROME R. RICHTER,
WILLIAM H. ROBERTS,
Attorneys for Defendants.

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH,

Plaintiff,

v.

STEWART S. CORT ET AL.,

Defendants.

MOTION FOR AN EVIDENTIARY HEARING ON THE QUESTION OF PLAINTIFF'S STANDING AND FOR CONTINUATION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Plaintiff by his attorney hereby moves the Court for an evidentiary hearing on the question of plaintiff's standing and for continuation of defendants' motion for summary judgment. More particularly, plaintiff requests:

1. That a jury be empaneled to try all factual issues material to plaintiff's standing;

2. That plaintiff be given the opportunity to subpoena witnesses in his behalf;

3. That defendants' motion for summary judgment be continued until such time as the Court has ruled on plaintiff's standing.

In support of plaintiff's motion, plaintiff asserts as follows:

1. That standing is the principal question raised by defendants in their motion for summary judgment;

2. That this Court has previously observed that the question of standing is a factual question in its discussion of plaintiff's motion for preliminary injunction [entered October 30, 1972].

3. That plaintiff has not had an opportunity to develop any facts of record related to the issue of standing and that evidence material to this issue is not in the present possession of plaintiff but may be secured only by testimony of witnesses who must be produced by compulsory process of this Court; and,

4. That plaintiff has at all times reserved his right to trial by jury of all material facts by endorsing "JURY TRIAL DEMANDED" on his Complaint and Amended Complaint.

WHEREFORE, plaintiff requests that his motion be granted and that an evidentiary hearing be held and that defendants' motion for summary judgment be continued pending a ruling on plaintiff's standing.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia. 19103
Attorney for Plaintiff.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH,

Plaintiff,

v.

STEWART S. CORT ET AL.,

Defendants.

AFFIDAVIT.

RICHARD A. ASH, being duly sworn, deposes and says as follows:

1. That he is plaintiff in the above action and that he is a member of the bar of this Court;

2. That he makes this affidavit in support of plaintiff's motion for an evidentiary hearing on the question of plaintiff's standing and for continuation of defendants' motion for summary judgment.

3. That he has investigated facts material to the question of plaintiff's standing and that he has established the following factual conclusions:

a. the Justice Department of the United States has historically failed to enforce the election laws of the

United States including Title 18 U. S. C. Section 610 and its predecessor statutes;

b. the Justice Department was intentionally made subservient to the reelection goals of the Republican Nixon administration so as to render it inadequate to enforce the election laws including Title 18 Section 610 in the 1972 presidential election;

c. the Justice Department lacks the requisite staff and resources to effectively enforce the election laws of the United States including Title 18 Section 610.

d. the General Accounting Office assumes no responsibility for investigation of violations or enforcement of Title 18 U. S. C. Section 610.

4. That he has located through documentary research and personal interview in excess of ten witnesses in the United States who have testimony supporting the above factual conclusions whom he will produce by compulsory process of this Court if an evidentiary hearing is granted. A partial list of such witnesses is attached hereto as Exhibit A.

/s/ RICHARD A. ASH,
Richard A. Ash.

Sworn to and subscribed before me this 26 day of June, 1973.

/s/ NANCY H. BERGMAN

Nancy H. Bergman Notary Public
Philadelphia, Philadelphia County
My Commission Expires May 6, 1976
Member, Pennsylvania Association of Notaries

Exhibit A.

JOHN W. GARDNER
PHILIP H. HUGHES
JAMES H. DUFFY
JOHN W. DEAN, III
JEB STUART MacGRUDER
JOHN MITCHELL
RICHARD KLEINDIENST
JOHN J. MARDIAN
ROBERT HIGGINS
ELMER STAATS
HENRY E. PETERSON
HOWARD HUNT
JAMES McCORD

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

RICHARD A. ASH

v.

STEWART S. CORT ET AL.

ORDER.

AND NOW, this 11th day of July, 1973, upon a finding that the issue whether plaintiff has an implied right to prosecute a cause of action under 18 U. S. C. § 610 is a question of law to be determined by the Court based upon, *inter alia,* the language, legislative history and purpose of the Act, IT IS ORDERED that plaintiff's motion for an evidentiary hearing and for continuation of defendants' motion for summary judgment is DENIED. In addition, upon consideration of the entire record, oral argument and briefs submitted by the parties and upon a finding (1) that no legal basis has been presented by the plaintiff to justify the relief sought, and (2) that no genuine issues of material facts exist, IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

/s/ E. MAC TROUTMAN, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 72-1925.

JURY TRIAL DEMANDED.

RICHARD A. ASH,

Plaintiff

v.

STEWART S. CORT ET AL.,

Defendants.

NOTICE OF APPEAL.

Notice is hereby given that plaintiff Richard A. Ash hereby appeals to the United States Court of Appeals for the Third Circuit from the order of the above Court denying plaintiff's motion for an evidentiary hearing and for continuation of defendants' motion for summary judgment and granting defendants' motion for summary judgment, entered July 11, 1973.

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia. 19103
Attorney for Plaintiff.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH,

Appellants

v.

STEWART S. CORT, ET AL.,

Appellees.

DESIGNATION OF PARTS OF RECORD TO BE INCLUDED IN APPENDIX AND STATEMENT OF ISSUES TO BE PRESENTED FOR REVIEW.

TO APPELLEES IN THE ABOVE CAPTIONED ACTION:

Appellant hereby designates parts of the record to be included in the appendix and states the issues to be presented for review in the above captioned appeal. If you deem it necessary to direct the particular attention of the Court to parts of the record not designated herein, you should serve on appellant a designation of these parts within ten days of service hereof pursuant to Fed. R. App. P. 30(b).

PARTS OF RECORD TO BE INCLUDED IN APPENDIX.

1. Docket entries
2. Amended Complaint

3. Proposed answer to Amended Complaint.
4. Motion of Plaintiff for Preliminary Injunction
5. Amendment to Plaintiff's Motion for Preliminary Injunction
6. Decision of Court below denying plaintiff's Motion for a Preliminary Injunction, Order
7. Stipulation of Agreed Upon Facts
8. Notice of Appeal from Denial of Preliminary Injunction
9. Opinion of Court of Appeals affirming denial of preliminary injunction
10. Defendants' Motion for Summary Judgment
11. Two-page index to Memorandum of Law in Support of Defendants' Motion for Summary Judgment
12. Plaintiff's Motion for an Evidentiary Hearing and for Continuation of Defendants' Motion for Summary Judgment, accompanying affidavit of plaintiff
13. Order of court below of July 11, 1973, denying plaintiff's motion for an evidentiary hearing etc. and granting defendants' motion for summary judgment
14. Notice of appeal from order (#13 above).

ISSUES TO BE PRESENTED FOR REVIEW.

1. Does a party who is both a shareholder of a corporation and a member of the electorate qualified to vote in a federal election have standing to seek injunctive relief, declaratory relief or damages on behalf of the corporation based on a complaint against the directors of the corporation alleging that directors spent corporate funds in violation of Title 18 U. S. C. Section 610?

2. Could the court have concluded that no genuine issues of material facts exist in light of the broad allegations of the amended complaint and the limited scope of the record before the court?

3. Is the expenditure of corporate funds for the promulgation of advertising in the manner and of the nature complained of violative of Title 18 U. S. C. Section 610?

4. Is Title 18 U. S. C. Section 610 as sought to be enforced violative of the United States Constitution, Amendment I?

Dated: September 6, 1973

/s/ CLETUS P. LYMAN,
Cletus P. Lyman,
1612 Latimer Street,
Philadelphia. 19103
Attorney for Plaintiff-Appellant.

To:

Edwin P. Rome, Esq.
Four Penn Center Plaza
Philadelphia. 19104

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION,

v.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

Appellees,

and

BETHLEHEM STEEL CORPORATION,
Nominal Defendant

Richard A. Ash,

Appellant

(D. C. Civil Action No. 72-1925)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 17, 1974

Before SEITZ, *Chief Judge,* HASTIE and ALDISERT, *Circuit Judges.*

Cletus P. Lyman
Attorney for Appellant
1612 Latimer Street
Philadelphia, Pennsylvania

Edwin P. Rome
Jerome R. Richter
William H. Roberts
Attorneys for Appellees

Of Counsel
Blank, Rome, Klaus & Comisky
Four Penn Center Plaza
Philadelphia, Pennsylvania 19103

OPINION OF THE COURT

(Filed April 16, 1974)

SEITZ, *Chief Judge.*

Plaintiff, a stockholder in Bethlehem Steel Corporation and registered to vote in federal elections, appeals from an order of the District Court for the Eastern District of Pennsylvania denying his request for an evidentiary hearing and granting defendants' motion for summary judgment. Defendants are directors of Bethlehem. The gravamen of plaintiff's complaint is that defendants caused Bethlehem to expend money to help secure the election of the Republican party's 1972 presidential candidate. Plaintiff asserts that the corporate expenditures, for an advertisement and a pamphlet, violated a federal prohibition on corporate campaign spending, 18 U. S. C. § 610, (1970) as amended (Supp. II 1972). Plaintiff, seeking an injunction and damages, invokes federal jurisdiction over this claim under 28 U. S. C. § 1331 (1970), making the requisite jurisdictional allegations.

The district court's order granting summary judgment merely recited that no material factual dispute existed and that defendants were not liable to plaintiff for the claimed violation of federal law. We presume that this assertion was bottomed on the findings and conclusions relied upon by the district court to support its earlier denial of a preliminary injunction. See 350 F. Supp. 227 (E. D. Pa. 1972). Defendants argue on appeal the propriety of those findings and conclusions and urge that the summary judgment be affirmed on that basis. The major points of the district court's decision are that plaintiff would have no cause of action from defendants' violation of 18 U. S. C. § 610 (1970), as amended (Supp. II 1972), and that, in any event, defendants did not violate § 610.

I.

Before addressing the points urged by defendants to justify and plaintiff to attack summary judgment, we must consider two matters of justiciability.

Mootness.

In affirming the district court's earlier denial of a preliminary injunction, we limited our decision narrowly, holding only that the court's finding of no irreparable harm to plaintiff from denying the injunction was not clearly erroneous. 471 F. 2d 811 (3d Cir. 1973). At that time, however, we noted that the question of mootness would have to be examined at a later point in these proceedings. *Id.* at 812. As originally drawn, plaintiff's complaint focused on the 1972 presidential election and sought to prevent corporate expenditures from influencing that election. That election is now history. Nonetheless, plaintiff alleges that defendants intend to make similar expenditures in future elections, and defendants, far from denying this, hotly defend their right to do so.

Controversies concerning elections often have presented mootness problems. See, e.g., *Hall v. Beals,* 396 U. S. 45 (1969); *Moore v. Ogilvie,* 394 U. S. 814 (1969). These problems arise since election controversies almost always are spawned shortly before the election, seek prospective relief directed to the election, and reach appellate courts only after the election. Where the basis of such a controversy remains after an election and where the dispute is likely to recur, the case will not be found moot, even where prospective relief alone is sought. *Moore v. Ogilvie, supra* at 816. When this case was before us on appeal of the preliminary injunction denial, the complaint asserted pendent federal jurisdiction over a claim arising under state law; although the complaint was ambiguous, it apparently sought injunctive relief for defendants' alleged violation of federal law and, on behalf of the corporation, damages for the claimed state law violation. Our concern with mootness arose in this context.

Were plaintiff's federal claim pressed solely to secure injunctive relief, we would be required to determine whether plaintiff's bare allegation of defendants' intention to make future similar expenditures would support review, given no showing of a consistent pattern of such conduct and no assurance of plaintiff's continued ownership of Bethlehem stock. After proceedings resumed in the district court, however, the plaintiff amended his complaint and now clearly demands, in addition to injunctive relief, damages on behalf of the corporation for violation of § 610.[1] Even if plaintiff has no live claim for injunctive

1. Plaintiff in his amended complaint has dropped the allegations contained in the state law count of his original complaint. One allegation from the federal count of the original complaint and carried over verbatim in the amended version, however, declares, without elaboration that defendants violated both state and federal law. Defendants, presuming that plaintiff thus had not abandoned his state claim, moved for summary judgment on the federal claim and dis-

relief, the dispute over damages renders this controversy justiciable. See *Powell v. McCormack*, 395 U. S. 486, 495-500 (1969). We need not decide whether plaintiff's claim would be moot if he did not seek damages as well as an injunction.[2]

Question also is raised concerning plaintiff's standing to prosecute this action. As a constitutional matter, all that is required for standing is that the plaintiff have been personally injured or be threatened with such injury and that the injury be directly related to plaintiff's legal claim. *Flast v. Cohen*, 392 U. S. 83, 101 (1968); *Baker v. Carr*, 397 U. S. 186, 204 (1962). Plaintiff alleges economic injury, as a stockholder whose interest in Bethlehem is worth less than it would be had defendants not caused the challenged expenditures to be made, and further injury as a citizen and voter whose ability to secure a responsive federal government has been lessened. While these injuries, tangible and intangible, may be small, they are personal to plaintiff, directly related to his claim, and may be remedied by the injunctive and damage relief sought; hence they are sufficient to support plaintiff's standing. See *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U. S. 669, 685-89 (1973), and cases cited *id.* at 689, n. 15.

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1. (Cont'd.)
missal of plaintiff's pendent state claim for want of jurisdiction following judgment for defendants on the only federal matter. The district court does not mention plaintiff's state claim, but merely grants defendants' motion. We assume that if plaintiff did not abandon his state law claim, the district court's order dismissed that claim for want of federal jurisdiction but do not reach the dismissal's propriety.

2. Since the controversy between plaintiff and defendants is not moot, the viability of plaintiff's claim for injunctive relief must be determined, if plaintiff prevails on the merits, according to settled principles controlling the district court's discretion to grant or withhold injunctive relief. *See* J. Moore, 7 Moore's Federal Practice Para. 65.18[3] (2d ed. 1969).

Plaintiff's standing is not defeated by the fact that his injuries are shared by countless others. Although the Supreme Court's language in *Frothingham v. Mellon*, 262 U. S. 447, 487 (1923), indicated that an injury to many might confer standing to none, *Flast* intimates that *Frothingham* stated policy, not constitutional dogma, *Flast v. Cohen, supra* at 93-94, and *SCRAP* declared that standing is not lost because the harm asserted is universally shared, *United States v. SCRAP, supra* at 686-88. Finally, because we are asked not to review administrative action but to adjudicate private rights, we need not determine whether the statute asserted to provide plaintiff's cause of action places him outside the class permitted to invoke our processes. Cf. *Davis v. Romney*, Nos. 73-1249 & 73-1420, slip op. at 3-5 (3d Cir. 1974); compare *Flast v. Cohen, supra* at 101-06, and *Baker v. Carr, supra* at 204-08, with *Sierra Club v. Morton*, 405 U. S. 727, 733 (1972), and *Association of Data Processing Service Organizations v. Camp*, 397 U. S. 150, 153-54 (1970). Alleging personal injury from defendants' violation of a federal statute, plaintiff may invoke our jurisdiction under 28 U. S. C. § 1331 (1970); questions of statutory construction will be met in determining whether plaintiff has stated a cause of action and in ruling on the merits of his claim.

II.

The district court's decision that defendants were entitled to judgment as a matter of law rested on several legal conclusions, among them that plaintiff failed to state a cause of action. Plaintiff relies upon 18 U. S. C. § 610 (1970), as amended (Supp. II. 1972), as providing his cause of action. Section 610, *inter alia*, makes it "unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with any [federal] election . . .,"

and provides criminal penalties for its violation. Plaintiff contends that, although it expressly provides only penal sanctions, § 610 "implies" a cause of action in his favor.

Standards for Implied Cause

To find a cause of action "implied" in a statute, we must determine (1) that the provision violated was designed to protect a class of persons including the plaintiff from the harm of which plaintiff complains and (2) that it is appropriate, in light of the statute's purposes, to afford plaintiff the remedy sought. *Bivens v. Six Unknown Named Agents,* 403 U. S. 388, 395-97 (1971); *Wyandotte Co. v. United States,* 389 U. S. 191, 200-02 (1967); *J. I. Case Co. v. Borak,* 377 U. S. 426, 431-35 (1964). Finding an implied cause pursuant to these criteria is not entirely an exercise in divining legislative intent. Certainly, legislative intent is relevant; where the legislature clearly has indicated its intent to grant or withhold a cause of action, implicitly or explicitly, courts will give effect to that intent. E.g., *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 42 U. S. L. W. 4132, 4134-35 (U. S. January 9, 1974). Absent some reasonably clear indication of legislative attention to the possible creation of a cause of action, however, courts ascertain the policies underlying the substantive law and determine the propriety, as a means of effectuating those policies, of affording litigants a particular remedy. *Bivens v. Six Unknown Named Agents, supra* at 395-97 (opinion of the Court), and 402-03, n. 4 (Harlan, J., concurring); *Holloway v. Bristol-Meyers Corp.,* 485 F. 2d 986, 989-99 (D. C. Cir. 1973).

We are urged to find that this process of judicial policy consideration to determine whether an "implied" cause of action can be asserted was rejected by the Supreme Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra* (hereinafter "*Amtrak*"). Relying on the maxim *expressio unis est exclusio alterius* [expression of one thing is exclusion of others], the Court declared in *Amtrak* that ". . . when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Id.* at 4134. This rule of statutory construction does not alter the process used to determine if a cause should be inferred in the absence of statutory language indicating legislative intent; rather, it aids the court merely in determining when legislative intent to preclude a remedy can be fairly implied.[3]

For the *Amtrak* rule to apply, the statute must expressly provide the plaintiff a remedy that may logically be said to be exclusive. In *Amtrak,* the remedy expressly provided to correct the harm of which plaintiffs complained was a civil action prosecuted by the Attorney General. 45 U. S. C. § 547 (1970). In the instant case, no express civil action is provided to remedy plaintiff's, or any other, alleged injury.[3a] Only a criminal sanction is expressly pro-

3. The extent to which the Supreme Court relied on the rule of statutory construction in *Amtrak* is unclear. After announcing the rule, the Court went on to find evidence of a clear legislative intent to withhold the remedy sought, National R. R. Pass. Corp. v. National Ass'n of R. R. Pass., 42 U. S. L. W. 4132, 4134-35 (U. S. Jan. 9, 1974); the Court also examined the policies, as it conceived them, behind the "Amtrak Act", Railroad Passenger Service Act of 1970, 45 U. S. C. §§ 501, *et seq.* (1970), and found that implication of a private remedy there would be inconsistent with those policies, *id.* at 4135-36.

3a. Judge Aldisert notes that, in contrast to title II of the Federal Election Campaign Act of 1971, amending *inter alia* § 610, title III expressly provides a civil cause of action to the Attorney General. This provision referred to by Judge Aldisert allows the Attorney General to institute a civil action for violation of certain reporting and disclosure requirements imposed on candidates and campaign committees. These requirements were first imposed by the 1971 Act and criminal penalties for their violation were first provided in the 1971 Act.

Provision of this civil remedy may well bar inference of a private remedy for violation of these reporting and disclosure requirements.

vided for violation of § 610. Courts have consistently held that statutes providing for criminal liability do not preclude assertion of private causes of action. E.g., *Wyandotte Co. v. United States, supra* at 200-02; *Texas & Pacific Railway Co. v. Rigsby,* 241 U. S. 33, 39-41 (1916). In *Rigsby* the Supreme Court, inferring a private cause of action for violation of a criminal provision, distinguished "remedial" from "penal" application of a statute. *Id.* at 41. Thus, since § 610 cannot be said to provide any remedy for the alleged harm to plaintiff here, *Amtrak* would not preclude finding an implied cause.

Statutory Design

Our inquiry, then, must be, first, whether § 610 was designed to protect plaintiff from the harm he alleges. Section 610 is the end-product of a series of enactments limiting campaign giving and spending. See *United States v. UAW,* 352 U. S. 567, 570-84 (1957). In discussing the seminal federal limitation on corporate campaign contributions, carried forward into the present § 610, the Supreme Court stated that it was "motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials have no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." *United States v. CIO,* 335 U. S. 106, 113 (1948) [footnotes omitted].

3a. (Cont'd.)
We do not, however, believe that any intent to bar the remedies sought here can be inferred from the 1971 Act's grant of a civil, as well as a criminal, action for violation of conduct first proscribed in 1971 and its failure to grant any civil remedies for conduct prohibited since 1907. Amtrak certainly does not require that such an inference be drawn from the 1971 Act's amendment of longstanding criminal provisions coincidentally joined, albeit in separate titles, with promulgation of new civil and criminal actions.

As a voter and citizen, plaintiff is within the class Congress sought to protect by prohibiting corporate expenditures in campaigns for federal office; Congress, in the various enactments embodied in § 610, declared its view that such expenditures reduced the ability of voters to secure a government responsive to their wishes and increased the likelihood of governmental actions favoral' to particular economic blocs but inimical to the general welfare. *Id.;* 117 Cong. Rec. 43379-81 (1971) (remarks of Congressman Hansen).

As a stockholder, plaintiff is within the class secondarily protected by § 610, which keeps control over political contributions in his hands and not in those of corporate managers or directors. *Id.;* 117 Cong. Rec. 43384-85 (remarks of Congressman Thompson). The harm to plaintiff as a voter and citizen, while not set forth explicitly in his complaint, is presumably the intangible harm foreseen by Congress. The alleged harm to plaintiff and other Bethlehem stockholders is the loss of over one-half million dollars from the corporation's treasury for the challenged expenditures.[4] Clearly plaintiff satisfies the first requirement for determining a cause of action to be implied in § 610.

Defendants contend, however, that Congressional intent to protect voters, citizens and stockholders does not satisfy the implied cause test. First, defendants argue that § 610 primarily protects not voters and citizens but the public in general and that a cause of action will only be implied to protect members of a specific, limited class. We

4. In focusing on the harm to plaintiff and the propriety of according him a remedy, we are aware that damages are sought not for plaintiff as an individual stockholder but, in the form of a derivative action, for all injured stockholders. Where stockholders suffer injury jointly from violation of federal rights, a derivative action may be an implied remedy. *See* Drachman v. Harvey, 453 F. 2d 722, 736-38 (2d Cir. 1972) (in banc).

reject defendants' argument that provisions designed for the protection of the entire American public cannot give rise to implied causes. See *Bivens v. Six Unknown Named Agents, supra* (finding a private cause of action implied in the Fourth Amendment's protection of "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . . ."). The breadth of the protected class is, however, relevant to the propriety of allowing criminal sanctions, rather than private actions, to enforce a statutory prohibition and will be considered below.

Second, defendants argue that no cause of action may be implied to protect plaintiff *qua* stockholder because such protection was only a secondary purpose of § 610. Although it may be improper to infer a cause of action from a statute only incidentally protecting plaintiff, the Supreme Court has indicated that protection of stockholders was not merely an incidental purpose of § 610, *United States v. CIO, supra* at 113, and protection of plaintiff need not be the act's primary purpose. See *J. I. Case Co. v. Borak, supra* at 431-32; cf. *Wyandotte Co. v. United States, supra.*

Propriety of Private Action.

In determining the propriety of affording plaintiff a cause of action for violation of § 610, we must ascertain whether such a remedy will effectuate the act and whether any "collateral" considerations counsel withholding this remedy. Since the purpose of the section is to prevent certain expenditures, allowing suit to enjoin or recover such expenditures would seem to be consistent with accomplishment of § 610's goal. Although the breadth of § 610's coverage favors enforcement solely by criminal sanction to avoid a multiplicity of possible suits challenging intangible public harm,[5] the intent to protect many people

5. This objection pertains to suits by non-stockholder citizens. Here, of course, plaintiff sues not only as a citizen and voter but also as a stockholder of the allegedly offending corporation, a narrower

from many possible violations also favors individual suits to enforce the act as the number of putative defendants, committing acts more likely to be covert than notorious, is so great that government enforcement alone might prove insufficient, cf. *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F. 2d 649, 651 (3d Cir. 1967). We note that stockholders, able to protect their investments by recovering damages on behalf of the corporation, may be expected to be particularly vigilant in detecting violation of § 610.

The nature of the prohibited conduct further supports provision of private remedies. Contributions or expenditures to influence federal elections are prohibited; yet the politician whose election is facilitated by violation of § 610 may be in charge of the statute's enforcement. This possible conflict of interest is not simply hypothetical; plaintiff alleges that in the instant case non-enforcement of § 610 by the Justice Department was due to the Department's control by the candidate defendants supported.[6]

The relative expeditiousness possible in civil, contrasted with criminal, proceedings, also supports implication of a cause here. The section's primary focus is on preventing the corruption of elections by corporate contributions. Violations of § 610 are, we presume, most likely

5. (Cont'd.)
class suffering tangible harm. We recognize also that the number of putative § 610 plaintiffs would be much smaller where, for instance, a Congressional rather than Presidential election is involved.

6. Among reasons cited by the district judge for concluding that plaintiff lacked a cause of action was his unwillingness to "assume the partisan enforcement of the Act as plaintiff suggests." 350 F. Supp. at 231. We make no such assumption here. While plaintiff has alleged, and presumably stands ready to prove, partisan enforcement of § 610, our finding of a cause of action is supported simply by the possibility of such enforcement, or non-enforcement—presence or absence of actual partisan enforcement in this case is irrelevant to our determination.

to occur in the period immediately preceding an election, and, given the delays incident to criminal investigation and grand jury indictment as well as trial, the election may well be over before the section's violation is determined. Private enforcement, particularly by injunction, can be relatively swift.

We note no countervailing reason for denying private remedies here. The matter before us involves none of the "special circumstances" discussed in *Borak* as counseling denial of a private cause of action. See *J. I. Case Co. v. Borak, supra* at 396-97. Nor does § 610 involve the operation of a regulatory agency whose policy determinations on this or other matters might be threatened by allowing private enforcement. See *Holloway v. Bristol-Meyers Corp., supra* at 990-92, 997-1002. Thus, we find allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief, proper to remedy violation of § 610.[7]

III.

The district court concluded, defendants contend rightly, that even if plaintiff were found to have a cause of action under § 610, defendants would be entitled to judgment as a matter of law. 350 F. Supp. at 231-32. The court decided that the meaning of "contribution or expenditure" in § 610 was governed by the definition of those terms in 18 U. S. C. § 591 (1970), as amended (Supp. II 1972); that § 591 requires a purpose to influence the nomination or election of a particular person; and that defendants' advertisements and pamphlets were designed not to influence election of any person but to advocate an honest campaign and "respond to an accusation leveled against the business community." *Id.* Plaintiff contests and defendants support each of these conclusions.

7. The propriety of awarding such relief must depend on the circumstances of each case. We note also that where a non-stockholder plaintiff sues, presumably only for injunctive relief, there may be a question as to the plaintiff's ability to satisfy the $10,000 jurisdictional amount for 28 U. S. C. § 1331 (1970).

Scope of § 610.

Plaintiff disagrees with judging Bethlehem's expenditures by the § 591 definition of that term, claiming that § 610 contains a more specific definition of the term, which should control here. Section 591, in relevant part, reads:

> When used in sections 597, 599, 600, 602, 608, 610 and 611 of this title—
>
> * * *
>
> (f) "expenditure" means—
>
> (1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . ., made for the purpose of influencing the nomination for election, or election, of any person to Federal office . . . .

Section 610, as pertinent, states that "[a]s used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment . . . to any candidate, campaign committee, or political party or organization . . . ." Corporate communication to stockholders and non-partisan "get-out-the-vote" drives aimed at stockholders and their families are explicitly excluded.

The definition given "expenditure" in both sections traces back to the Federal Election Campaign Act of 1971, P. L. 92-225, Title II, §§ 201, 205, 86 Stat. 3. The drafters clearly intended § 591's definition to affect interpretation of § 610, for they expressly provided that the definitions in § 591 applied to use of those terms in § 610. We note

also that § 591 indicates the "meaning" of expenditure while § 610 only indicates certain matters "included" in that term. We therefore read § 610 as supplementing rather than replacing § 591's definition. Nothing specifically included as an expenditure for § 610, however, covers Bethlehem's challenged actions. Thus, it appears that the district court was correct in concluding that Bethlehem's challenged expenditures are not proscribed unless they fall within § 591's definition of "expenditure."

An integral part of § 591's definition of prohibited expenditures is the requirement that they be for the purpose of influencing someone's election to federal office—in other words, § 591 requires a partisan purpose. Plaintiff argues, however, that § 610, by negative implication in its exclusion of only some non-partisan get-out-the-vote drives, makes unlawful other get-out-the-vote drives, even though non-partisan. Plaintiff supports his contention by reference to legislative history.

Several comments by key Congressmen in debate over the most recent amendment to § 610 indicate that the section now would prohibit a non-partisan get-out-the-vote drive if financed from a corporation's general treasury and aimed at the general public. See, e.g., 117 Cong. Rec. 43380-81 (remarks of Congressman Hansen), 43381 (remarks of Congressmen Hansen and Hays), 43387-88 (remarks of Congressmen Ashbrook, Hansen and Hays). The debates also indicate that members of Congress had a fairly specific and limited type of activity in mind when speaking of "get-out-the-vote" drives, primarily door-to-door canvassing and escorting people to the polls, see *id.* at 43386 (remarks of Congressman Crane), 43387 (remarks of Congressman Ashbrook), 43388 (remarks of Congressman Hays), and that the primary concerns with such drives were, first, that they were generally non-partisan

in name only, and, second, that their partisanship was not often apparent to observers, see *id.* at 43388 (remarks of Congressman Ashbrook), 43390 (remarks of Congressman Steiger).

Application of § 610.

The expenditures challenged here were for activities that would not seem to have the hallmarks of a "get-out-the-vote" drive—Bethlehem's communications were in writing and aimed at the entire public, rather than selected portions, so their partisanship, if any, could be readily determined. We would not, on the present record, find Bethlehem's expenditures for these communications, if non-partisan, to be proscribed by any prohibition on non-partisan get-out-the-vote drives that may be implicit in § 610. We turn to the inclusion or exclusion of these expenditures from the definition of that term in § 591.

The district court found that Bethlehem's expenditures were non-partisan and thus outside the sweep of § 591 and, hence, of § 610. This finding rests on the fact that no candidate or party was named in the corporation's ad and pamphlet. Unless § 591 requires that a candidate or party be named, the district court's grant of summary judgment cannot be upheld; the partisanship of Bethlehem's statements is a factual question as to which the parties are in dispute,[8] and on summary judgment we must accept as true plaintiff's allegation of partisanship. See *Johnson v. Alldredge*, 488 F. 2d 820, 823 (3d Cir. 1973).

Nothing in the language or legislative history supports an interpretation of sections 591 and 610 that would make lawful an expenditure simply because in the com-

8. The definition of expenditure in § 591 requires a partisan purpose; we assume here that where a communication is the expenditure's direct product, the partisan purpose must appear from the communications content, viewed in light of surrounding circumstances.

munication it paid for no candidate was named. There is no evidence Congress thought the American public so unperceptive that it would recognize a statement as supporting or attacking a particular candidate only by use of his name; such a requirement would eviscerate § 610. Since dispute exists as to a material factual issue, the district court erred in granting summary judgment and denying plaintiff's motion for an evidentiary hearing.

IV.

Defendants contend that § 610 is unconstitutional, urging a variety of grounds. Although defendants do not treat their various constitutional contentions separately, their underlying argument appears to be that, if applied to prohibit non-partisan political speech, § 610 would violate the First Amendment. Because we have decided that § 610 would proscribe Bethlehem's expenditures only if they financed partisan communications, we do not reach defendants' constitutional contentions. See *United States v. UAW, supra* at 591-92. We note that the district court has never passed on these contentions and that they may be reasserted on remand.

The judgment of the district court is reversed and the matter is remanded for further proceedings consistent with this opinion.

ALDISERT, *Circuit Judge*, dissenting.

Standing in this case does not trouble me. This is not a taxpayer's suit, *Flast v. Cohen*, 392 U. S. 83 (1968), *Frothingham v. Mellon*, 262 U. S. 447 (1923); nor a suit to obtain judicial review of agency action, *United States v. Students Challenging Regulatory Agency Procedures*, 412 U. S. 669 (1973), *Sierra Club v. Morton*, 405 U. S. 727 (1972), *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150 (1970); nor a voter's

complaint alleging impairment of his right to vote, *Baker v. Carr*, 369 U. S. 186 (1962). Only the damages aspect of the complaint has survived the mootness of the injunctive request. Thus, the claim is reduced to a garden variety case or controversy in which a plaintiff stockholder asserts economic harm to the corporation for which he has standing derivatively on behalf of the corporation. *Kauffman v. Dreyfus Fund, Inc.*, 434 F. 2d 727 (3d Cir. 1970), *cert.* denied, 401 U. S. 974 (1971).

I have heretofore expressed discomfort with certain decisions of this court regarding standing. *See, United States v. Richardson*, 465 F. 2d 844 (3d Cir. 1972), (Adams, J., dissenting, joined by Aldisert and Hunter, JJ.), and *Schiaffo v. Helstoski*, — F. 2d — (3d Cir., Nos. 72-2167/68, January 4, 1974) (Aldisert, J., dissenting.) And I would hope that the district courts and courts of appeals will soon receive definitive guidance in this "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations. . . ."[1] The Supreme Court has heard argument in two important standing cases, *United States v. Richardson, supra,* (No. 72-885, argued October 10, 1973), 42 U. S. L. W. 3216, and *Richardson v. Reservists Committee to Stop the War,* (No. 72-1188, argued January 14, 1974), 42 U. S. L. W. 3418.

The standing issue aside, I would affirm the district court because I find that Congress has not provided a civil remedy for the plaintiff expressly or by implication. While an implied right of action may be rationalized with considerable persuasion, this can be done only by defying the Supreme Court's recent pronouncement in *National Railroad Passenger Corp. v. National Association of Railroad*

1. *United States ex rel. Chapman v. Federal Power Commission*, 345 U. S. 153, 156 (1953).

Passengers, — U. S. —, (42 U. S. L. W. 4132, January 9, 1974) (Amtrak). I see Amtrak to be a definite signal to the courts of appeal and district courts to decelerate use of excerpts from Justice Clark's opinion in *J. I. Case Co. v. Borak,* 377 U. S. 426, 431-432 (1964), to find implied civil remedies not expressly authorized by Congress. Three bright warning lights were flashed in Amtrak:

> 1. "[T]he inference of . . . a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."
>
> 2. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Mills v. United States,* 278 U. S. 282, 289 (1929). This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.*"
>
> 3. "[T]he most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent. *Neuberger v. Comm'r,* 311 U. S. 83, 88 (1940)."

42 U. S. L. W. at 4134.

I.

Amtrak's first principle, the imperative to ascertain legislative intention, requires that we examine the entire legislative package known as the Federal Election Campaign Act of 1971. This case is brought under Title II of

the Act, containing amendments to Title 18 of the United States Code, including 18 U. S. C. § 610. There is no express provision for a civil remedy, public or private, in Title II. By contrast, Title II of the Act authorizes the Attorney General on behalf of the United States to commence a civil action for violation of its subchapter. *See,* 2 U. S. C. § 438(d)(1)-(5). This public cause of action in Title III supplements the penal provision of that Title, 2 U. S. C. § 441. *See also,* 11 C. F. R. §§ 20.10 and 20.11. In *T. I. M. E., Inc. v. United States,* 359 U. S. 464 (1959), the Court refused to imply a private right of action in favor of shippers under the Motor Carrier Act of 1935, 49 U. S. C. § 316(b) and (d) (Interstate Commerce Act, Part II), for overcharges by certified carriers. The government, as a shipper, brought suit against the carrier contending that this language imposed a statutory duty on motor carriers not to charge or collect other than "reasonable" rates and urged that a cause of action be implied. The Supreme Court refused to imply a cause of action. Noting that the provisions of Part I and III of the Interstate Commerce Act, relating to rail and water carriers, granted a private remedy to shippers, the Court emphasized that similar provisions were conspicuously absent in Part II relating to motor carriers. The Court said that creation of a remedy under these circumstances "would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I." 359 U. S. at 471. I would apply the *ratio decidendi* of *T. I. M. E., Inc.,* to these proceedings.

Further, Congress recently has had occasion to reexamine § 610. In the course of amending this section and enacting the Federal Election Campaign Act of 1971, Congress did not provide a private remedy to supplement the express criminal sanctions.

I detect no language in this Act manifesting Congressional intent to create a private right of action by implication similar to *J. I. Case Co. v. Borak, supra,* and *Texas & Pacific Railway Co. v. Rigsby,* 241 U. S. 33 (1916). I therefore would accept the cogent reasoning of the Tenth Circuit in *Chavez v. Freshpict Foods, Inc.*, 456 F. 2d 890, 895 (10th Cir.), *cert. denied,* 409 U. S. 1042 (1972):

> We recognize that the tripartite classification of governmental powers—legislative, executive and judicial —has no absolutes, and that governmental functions are not easily defined as "legislative", "executive" or "judicial". But in the cases at bar the substantive rights relied upon by the appellants have been promulgated by Congress in the exercise of its power to enact penal statutes. In effect, appellants urge this court, under its classical adjudicative power, to legislate. When Congress was dealing with the subject matter of the statutes here involved, it was capable of clearly and directly providing the rights and remedies urged by the appellants.

II.

I am persuaded that this is a classic case for the application of Amtrak's second principle which teaches: "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." A legislative schema expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar "principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*"

III.

Amtrak's third principle, that statutory construction must yield to clear cortrary legislative intent, renews the

previous emphasis on Congressional intent. But appellant conceded at oral argument that the Congressional history is devoid of any reference to a private civil remedy. Therefore, we lack any semblance of contrary legislative intent, let alone clear contrary legislative intent.

It seems to me, therefore, that a discussion of the necessity for destroying the influence over elections which corporations exercise through financial contributions and the recognition that corporate officials have no right to use corporate funds improperly, *United States v. C. I. O.,* 335 U. S. 106, 113 (1948), is simply irrelevant to the narrow issue posed by this appeal: whether it can be properly concluded that a private civil right of action may be implied to supplement the penal provisions of Title II. Our polestar is Congressional intention. To imply such a right is to presume that Congress intended to provide for such an action, but overlooked its inclusion when the Federal Corrupt Practices Act was originally enacted, and that Congress overlooked it again when it enacted the comprehensive Federal Election Campaign Act of 1971. I cannot impute such derelictions to a Congress vitally concerned in a matter so universally discussed and the subject of manifest, if not all-consuming, public interest.

The Supreme Court's entreaty for restraint in Amtrak is justified. Otherwise a reasoned case for an implied private right of action could be constructed within the framework of every federal criminal statute simply by showing that plaintiff is "within the class Congress sought to protect by prohibiting" certain conduct. Three comprehensive criminal codes have been introduced in the 93rd Congress: S. 1., "Criminal Justice Codification, Revision and Reform Act of 1973," described by its proponents, Senators McClellan, Ervin, and Hruska, as the lengthiest bill ever introduced in the Senate, exceeding the Internal Code of 1954;

H. R. 6046; S. 1400, "Criminal Code Reform Act of 1973"; and H. R. 10047, reflecting the recommendations of the National Commission on Reform of Federal Criminal Laws, styled "Federal Criminal Code Reform Act of 1973." Every criminal statute is designed to protect some individual, public, or social interest. The criminal statutes define offenses involving danger to the person, against property, against public order, health, safety and sensibilities, as well as offenses against national security, foreign relations, immigration and nationalization, integrity and effectiveness of government operations, internal revenue and customs, civil rights and elections. Is it to be inferred that Congress is also considering an unwritten, but *intended,* comprehensive civil code at the same time? I don't think so.

If the "ambit of protection" test were to be applied to every criminal statute by the court, then it would follow that, given particular circumstances, a remedy could be fashioned to afford civil relief upon the breach of every criminal statute. And thus the federal judiciary, and not the Congress, would be defining the metes and bounds of federal court jurisdiction. But there is no authority for this, because it is the Congress, and not the federal judiciary, which creates subject matter jurisdiction for the federal courts. *See, Sheldon v. Sill,* 8 How. 440, 12 L. Ed. 1147 (1850); *Ex Parte McArdle,* 7 Wall. 506, 19 L. Ed. 264 (1869).

I am persuaded that the Amtrak court could not fail to notice the plethora of implied civil remedy cases which arose from an unrestricted application of *J. I. Case Co. v. Borak, supra,* and an overgenerous use of Justice Black's overgenerous quotation in *Bell v. Hood,* 327 U. S. 678, 684 (1946), that "federal courts may use any available remedy to make good the wrong done." I am convinced that the

Amtrak court consciously and deliberately applied the brakes and meant exactly what it said when it declared that a "private cause of action not otherwise authorized by statute" may not be implied in the absence of clear "evidence of legislative intent."

Although I recognize that the Presidential election of 1972 is a matter of dominant national, sociological and political interest in 1974, an imperative of a detached decisional process commands that neutral principles of construction be employed in all our cases because of the precedential or institutional effect of our determinations. To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code. And to do this is to suggest that for every written volume of Title 18 of the United States Code there is an unwritten volume of Title 28.

Because I cannot begin to accept this notion, I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1739.

Re: RICHARD A. ASH
PLAZA APARTMENT
18TH & BENJAMIN FRANKLIN PARKWAY
PHILADELPHIA, PA. 19104

ON BEHALF OF HIMSELF
AND ON BEHALF OF

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016

v.

STEWART S. CORT, CHAIRMAN
LEWIS W. FOY, PRESIDENT
EDWARD D. BICKFORD, VICE PRESIDENT
BERNARD D. BROEKER, VICE PRESIDENT
ALBERT M. REED, VICE PRESIDENT
C. THOMPSON STOTT, VICE PRESIDENT
IVOR D. SIMS, VICE PRESIDENT
CROWDUS BAKER
JESS H. DAVIS
THOMAS S. GATES
ROBERT B. HOBBS
GEORGE P. JENKINS,

ALL BEING DIRECTORS OF
BETHLEHEM STEEL CORPORATION

and

BETHLEHEM STEEL CORPORATION
701 EAST THIRD STREET
BETHLEHEM, PENNSYLVANIA 18016,

Nominal Defendant

RICHARD A. ASH, *Appellant,*

(D. C. Civil No. 72-1925)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ, *Chief Judge* and HASTIE and ALDISERT, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed July 11, 1973, be, and the same is hereby reversed and the matter is remanded for further proceedings consistent with this opinion. Costs taxed against appellees.

ATTEST:

/s/ THOMAS F. QUINN,
Clerk.

April 16, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1739.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,

v.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, ET AL.,

Appellees,

and

BETHLEHEM STEEL CORPORATION,

Nominal Defendant,

RICHARD A. ASH,

Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* HASTIE, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by APPELLEES in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked

for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ COLLINS J. SEITZ,
Judge.

Dated: May 15, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 73-1739.

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION,

v.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS AND GEORGE P. JENKINS, ALL BEING DIRECTORS OF BETHLEHEM STEEL CORPORATION,

Appellees,

and

BETHLEHEM STEEL CORPORATION,
Nominal Defendant,

RICHARD A. ASH,
Appellant.

MOTION OF APPELLEES FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI.

Appellees, by their undersigned attorneys, move the Court, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, for a stay of the mandate in the above appeal, and allege as follows:

1. On April 16, 1974, this Court—Chief Judge Seitz and Circuit Judges Hastie and Aldisert—reversed the Order of the United States District Court for the Eastern District of Pennsylvania (District Judge E. Mac Troutman) granting summary judgment in favor of defendants in this stockholders' action against the Directors of Bethlehem Steel Corporation ("Bethlehem"). Judge Aldisert dissented from the Opinion of the Court on the ground, *inter alia,* that the Majority Opinion was contrary to the recent decision of the Supreme Court of the United States in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* — U. S. —, 42 U. S. L. W. 4132 (Opinion filed January 9, 1974). See Slip Opinion at pp. 17-22.

2. On April 30, 1974 appellees filed a timely "Petition For Rehearing and Suggestion of Rehearing En Banc."

3. Appellees' "Petition For Rehearing and Suggestion of Rehearing En Banc" was denied by Order of this Court dated May 15, 1974.

4. Appellees intend to apply to the Supreme Court of the United States for a writ of certiorari for review of this case.

5. Rule 41(b) of the Federal Rules of Appellate Procedure provides that "[a] stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties." Rule 41(b) further provides that "[t]he stay shall not exceed 30 days unless the period is extended for cause shown" and that "[i]f during the period of the stay there is filed with the clerk of the court of appeals a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court."

WHEREFORE, appellees respectfully move this Court:

(a) to enter an order staying issuance of the mandate for a period of 30 days, and

(b) to order therein that if, within the period of the stay, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that appellees have filed a petition for a writ of certiorari in that Court, the stay thus granted by this Court shall continue until final disposition by the Supreme Court.

/s/ EDWIN P. ROME,
Edwin P. Rome,
JEROME R. RICHTER,
WILLIAM H. ROBERTS,

Of Counsel:
CURTIS H. BARNETTE
Martin Tower 2007
Bethlehem, Pa. 18016

BLANK, ROME, KLAUS & COMISKY,
1100 Four Penn Center Plaza
Philadelphia, Pennsylvania. 19103

Dated: May 17, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH, ETC.,

v.

STEWART S. CORT., ET AL.

RICHARD A. ASH,
Appellant.

ORDER.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 21, 1974.

/s/ COLLINS J. SEITZ,
Collins J. Seitz,
Chief Judge.

Dated: May 22, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1739.

RICHARD A. ASH, ETC., ET AL.

v.

STEWART S. CORT, ETC., ET AL.

RICHARD A. ASH,
Appellant.

(D. C. Civil Action No. 72-1925)

ORDER.

It is ORDERED that the record/~~exhibits~~ in the above-entitled case be and hereby is transmitted to the Clerk of the Supreme Court of the United States.

For THE COURT,

/s/ THOMAS F. QUINN,
Clerk.

Date: July 10, 1974

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 11, 1974

Edwin P. Rome, Esq.
Blank, Rome, Klaus & Comisky
Four Penn Center Plaza
Philadelphia, Pa. 19103

RE: CORT v. ASH
No. 73-1908

Dear Mr. Rome:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Encls.